Supreme Court, U.S.
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In the Supreme Court of the United States

RUTH PYLES, TRUSTEE OF THE CLARENCE AND RUTH PYLES TRUST,

Petitioner,

v.

COUNTY OF CLARK, A POLITICAL SUBDIVISION OF THE STATE OF NEVADA.

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NEVADA

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Did the Supreme Court of the State of Nevada violate the Fifth and Fourteenth Amendments to the United States Constitution in applying the undivided-fee rule as the sole method of assessment of fair market value, thereby frustrating an award of just compensation where there is more than one property interest and one of those interests is a leasehold interest of substantial value?

PARTIES TO THE PROCEEDINGS AND CORPORATE DISCLOSURE STATEMENT

The parties to the proceedings in the Supreme Court of the State of Nevada were petitioner Ruth Pyles, Trustee of the Clarence and Ruth Pyles Trust, Sun State Properties, Ltd., a Nevada limited partnership, and the County of Clark a political subdivision of the State of Nevada.

None of these parties is either a publicly held corporation or affiliated with an entity that is so held.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Ruth Pyles, Trustee of the Clarence and Ruth Pyles Trust, respectfully petitions for a writ of certiorari to review the judgment of the Supreme Court of the State of Nevada in this case.

OPINIONS BELOW

The opinion of the Supreme Court of the State of Nevada is reported at 119 Nev. Adv. Op. No. 36 and attached at App. 1. The order denying the petition for reconsideration is unreported and attached at App. 2. The order of the District Court of the State of Nevada is unreported and attached at App. 3. The Findings of Fact and Conclusions of Law of the District Court of the State of Nevada is attached at App. 4. The transcript of the trial is attached at App. 5.

JURISDICTION

The judgment of the Supreme Court of the State of Nevada was issued on July 21, 2003 and the petition for reconsideration was denied on August 29, 2003. This Court has jurisdiction over this petition under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides, in pertinent part, "nor shall private property be taken for public use, without just compensation."

Section 1 of the Fourteenth Amendment to the United States Constitution provides, in pertinent part, that: "No State shall make or enforce any law which shall abridge

the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

The pertinent part of Nevada Revised Statute § 37.110 states: "NRS 37.110 Ascertainment and assessment of damages. The court, jury, commissioners or master must hear such legal testimony as may be offered by any of the parties to the proceedings, and thereupon must ascertain and assess: 1. The value of the property sought to be condemned and all improvements thereon pertaining to the realty, and of each and every separate estate or interest therein; if it consists of different parcels, the value of each parcel and of each estate or interest therein shall be separately assessed. * * * As far as practicable, compensation must be assessed for each source of damages separately."

The pertinent part of Nevada Revised Statute § 37.115 states: "NRS 37.115 Distribution of award among joint defendants by separate proceeding. Where there are two or more estates or divided interests in property sought to be condemned, the plaintiff is entitled to have the amount of the award for such property first determined as between plaintiff and all defendants claiming any interest therein. The respective rights of such defendants in and to such award shall be determined by the court, jury, or master in a later and separate hearing in the same proceeding and the amount apportioned by order accordingly."

The pertinent part of Nevada Revised Statute § 37.009(6) states: "6. 'Value' means the most probable price which a property would bring in a competitive and open market under the conditions of a fair sale, without the price being

affected by undue stimulus, whereby the sale is consummated on a specified date and the title to the property is passed from the seller to the buyer under the following conditions:

(a) The buyer and seller are acting prudently and knowledgeably;
(b) The buyer and seller are typically motivated;
(c) The buyer and seller are well informed or well advised and acting in what they consider are their own best interests;
(d) A reasonable time is allowed to expose the property for sale on the open market;
(e) Payment is made with United States dollars in cash or pursuant to another financial arrangement comparable thereto; and
(f) The sale price represents the normal consideration for the property and is unaffected by special or creative financing or sales concessions granted by any person associated with the sale."

STATEMENT OF THE CASE

This is a Takings Clause case in which the Nevada Supreme Court applied its state statute, N.R.S. 37.115, in a manner that prevented just compensation as required by Fifth and Fourteenth Amendment. If this ruling is permitted to stand, then property owners in Nevada, and possibly elsewhere, would be prevented from receiving just compensation any time that the sum of separate interests in the same property exceeded the fair market value of the property, if it were unencumbered.

A. Statement of Facts and Procedural Posture

Respondent Clark County condemned real property in downtown Las Vegas that had been owned by the

Petitioner, the Clarence and Ruth Pyles Trust ("Pyles"), and co-defendant Sun State Properties, Ltd., a Nevada limited partnership ("Sun State"). Pyles owned property in fee simple, subject to a 55-year leasehold executed in 1963. Sun State owned a separate parcel in fee simple and further owned the leasehold interest to the Pyles property as a successor-in-interest.[1] Clark County conceded that its valuation of the fee simple value of the condemned property was not very different from that advanced by Petitioner Pyles or co-defendant Sun State—approximately $2,000,000.00. The disagreement between the two sides concerned the valuation of the Sun State leasehold interest. Clark County valued this interest at zero, based on its interpretation of the undivided-fee rule. Petitioner Pyles and co-defendant Sun State provided evidence of the leasehold value above and beyond the valuation of the fee simple value, which was not contradicted by any evidence produced by Clark County.

There were three experts who presented testimony in the case. Sun State hired Shelley Lowe to determine the value of the property if the fee were unencumbered. Sun State and the Pyles hired Ed Rothenberg to determine the separate values of the property interests—Sun State's leasehold, and the Pyles's fee subject to the leasehold, plus the reversion after the lease. Clark County hired Kiehlbauch to determine the value of the property if the fee were unencumbered. Ms. Lowe determined the value of the unencumbered property to be approximately $1,148,000.00.[2] Mr. Kiehlbauch determined the value of the unencumbered property to be approximately

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[1] Findings of Fact and Conclusions of Law, *County of Clark v. Sun State Properties, Ltd.*, Case No. A346912, District Court, Clark County, Nevada, filed March 13, 2000. (App. 4).

[2] Trial transcript, Nov. 30, 1999, p. 45.

$984,500.00.[3] Mr. Rothenberg, determined that the value of the leasehold interest was $1,000,000.00, and the value of the fee subject to the leasehold plus the value of the reversion fee in 2018 brought back to present value was $1,030,000.00.[4] Given this evidence that the sum of the separate interests was far greater than the unencumbered fee, the District Court found that the value of these combined interests was the amount of just compensation for the owners of these separate interests.[5]

The District Court held a subsequent hearing to apportion this amount, pursuant to Nevada Revised Statute 37.115. The Court held that Sun State was entitled to damages of $250,000.00 in severance damages; $462,000.00 in damages for he amount from the date and order of possession until the date of valuation; and $1,868,000.00 for the interest in the fee and leasehold interests, for a total of $2,580,000.00. The Court held that Pyles was entitled to $24,000.00 in damages for the amount from the date and order of possession until the date of valuation; and $1,030,000.00 for the interest in the fee and leasehold interests, for a total of $1,054,000.00.[6]

B. Supreme Court of Nevada

The Supreme Court of Nevada reversed, holding that Nevada Revised Statute 37.115 codified the undivided-fee rule, and that the District Court's aggregation of interests was in error and required reversal.[7] The Supreme Court of Nevada remanded the action for a new trial. The Supreme Court acknowledged at one point that Nevada Revised Statute 37.115 requires the court to consider

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[3] Trial transcript, Nov. 30, 1999, p. 199.
[4] Trial transcript, Nov. 30, 1999, p. 66, 76, 129, 132, 141.
[5] Findings of Fact, Conclusions of Law at p.2-3. (App. 4).
[6] *Id.*at p.4 (App. 4).
[7] *Clark County v. Sun State Properties*, 119 Nev. Adv. Op. No. 36 (2003) at 7. (App. 1).

encumbrances in determining the value of the property[8], but separately held that the undivided-fee rule provides "that condemned property is first valued as though it was unencumbered * * * ."[9] The Court refused to examine whether the undivided-fee rule results in an unjust award in this instance, stating: "If the statute results in unfairness, it is for the Legislature, not this court, to change the statutory scheme."[10] The statutory scheme, as applied here, requires the court "to first determine the fair market value of the property without any encumbrances, and then in a subsequent hearing, to apportion the value among the various interests."[11] If the encumbrance plus the combined reversion interest and fee interest subject to the encumbrance have a total value beyond the value of the unencumbered property—as the leasehold creates in this case—that added value due to the encumbrance simply goes uncompensated.

Following the Supreme Court decision, Petitioner Pyles applied for reconsideration. Reconsideration was denied on August 29, 2003 and this Petition is made to reverse the ruling of the Nevada Supreme Court as a violation of the Fifth Amendment and Fourteenth Amendment to the United States Constitution.

REASONS FOR GRANTING THE WRIT

A writ of certiorari should be granted in this case for one compelling reason. The Nevada Supreme Court expressly allows the state to seize property—here a combination of a fee simple subject to a leasehold interest, plus a leasehold interest—while denying the fact-finder the ability to determine the amount of compensation, and

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[8] *Id.* at p.15. (App. 1).
[9] *Id.* at p.9. (App. 1).
[10] *Id.* at p.15. (App. 1).
[11] *Id.* at p.4. (App. 1).

denying the district court the ability to provide full compensation for those interests. The fact-finder in this case, the district court, found that the sum of the separate property interests was larger than the value of the property, were it not subject to the leasehold. But under the ruling of the Supreme Court of Nevada, the separate interests are ignored and the property is treated as if it were not subject to a leasehold. This valuation scheme leaves Petitioner Pyles and co-defendant Sun State to fight over *pro-rata* reduced amounts of compensation assessed as the value of the unencumbered parcel, ignoring the lease interest.

A. United States Supreme Court Jurisprudence—What Compensation is Just?

In *Brown v. Legal Foundation of Washington*, __ U.S. __, 123 S. Ct. 1406 (2003), this Court reviewed the history of Fifth Amendment jurisprudence with respect to the question of "what compensation is just?" While the majority and minority opinions in the *Brown* case were divided on other issues, all agreed on the answer to this fundamental question. The majority opinion summarized thusly:

> The Fifth Amendment does not proscribe the taking of property; it proscribes taking it without just compensation.[12] All of the Circuit Judges and District Judges who have confronted the compensation question, * * * have agreed that the "just compensation" required by the Fifth Amendment is measured by the property owner's loss rather than the government's gain. This conclusion is supported by consistent and unambiguous holdings in our cases.

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[12] *Citing Williamson County Regional Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172, 194, 105 S.Ct. 3108 (1985).

> Most frequently cited is Justice Holmes' characteristically terse statement that "the question is what has the owner lost, not what has the taker gained."[13]

Also this Court answered the question of "what compensation is just" in *United States v. General Motors Corp.*[14] In *General Motors*, the property value was determined via a sum of costs incurred due to a wartime, temporary one-year use. This Court stated:

> When the sovereign exercises the power of eminent domain it substitutes itself in relation to the physical thing in question in place of him who formerly bore the relation to that thing, which we denominate ownership. * * * The constitutional provision is addressed to every sort of interest the citizen may possess."[15] In light of these principles it has been held that the compensation to be paid is the value of the interest taken. Only in the sense that he is to receive such value is it true that the owner must be put in as good position

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[13] *Citing Boston Chamber of Commerce v. Boston*, 217 U.S. 189, 195, 30 S.Ct. 459 (1910). See, also, *United States v. 50 Acres of Land*, 469 U.S. 24, 29, 105 S. Ct. 451 (1984) (holding that just compensation is "market value of the property at the time of the taking", quoting *Olson v. United States*, 292 U.S. 246, 255, 54 S. Ct. 704 (1934); *Kirby Forest Industries, Inc. v. United States*, 467 U.S. 1, 10, 104 S. Ct. 2187 (1984); *United States v. 564.54 Acres of Monroe and Pike County Land*, 441 U.S. 506, 511, 99 S. Ct. 1854 (1979); *Almota Farmers Elevator & Warehouse Co. v. United States*, 409 U.S. 470, 474, 93 S. Ct. 791 (1973); *United States v. Commodities Trading Corp.*, 339 U.S. 121, 130, 70 S. Ct. 547 (1950); *United States v. New River Collieries Co.*, 262 U.S. 341, 344, 43 S. Ct. 565 (1923).

[14] *United States v. General Motors Corp.*, 323 U.S. 373, 65 S.Ct. 357 (1945).

[15] *United States v. General Motors Corp.*, 323 U.S. at 378.

> pecuniarily as if his property had not been taken. In the ordinary sense, for want of a better standard, market value, so called, is the criterion of that value. In some cases this criterion cannot be used either because the interest condemned has no market value or because, in the circumstances, market value furnishes an inappropriate measure of actual value [for each interest].[16]

In these cases, the overriding concern is ensuring that private owners of property interests are compensated in an amount equal to the fair market value of their collective interests in the property. When there is more than one interest, there must be a reckoning of each of those interests. The case law of this Court is clear that whether measured separately or jointly, there must be enough compensation to ensure that each owner deprived of his property interest receives compensation equal to the amount that he has lost.

Thus, the question of "what compensation is just" is answered simply as "the amount that the owner (in this case, owners, plural) has lost."[17] Any valuation process that produces a compensation that is smaller than the amount that the owner has lost, or deliberately fails to fully compensate one of several owners of the same property, offends the Takings Clause of the Fifth Amendment and the Fourteenth Amendment.

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[16] *United States v. General Motors Corp.*, 323 U.S. at 379.

[17] *Boston Chamber of Commerce v. Boston*, 217 U.S. 189, 195, 30 S.Ct. 459 (1910); *United States v. 50 Acres of Land*, 469 U.S. 24, 29, 105 S. Ct. 451 (1984).

B. Nevada Supreme Court 4-3 Ruling is Not Just, Because It Fails to Provide the Amount that the Owners Lost in Terms of Fair Market Value

Without exception, this Court has held that property is not to be taken for public use without just compensation. But that is what Nevada has allowed with its application of the undivided-fee rule in this case. Here, there is more than one property interest being condemned, and one of those property interests is a leasehold at a below-market rental rate. Under these circumstances, the value of the leasehold has been proven to be substantial and the value of the reversion interest plus the fee subject to the leasehold is also substantial. The district court found that the sum of these interests exceeds the value of the property if it were not subject to the leasehold. The undivided-fee rule, as applied by the Nevada Supreme Court, ignores the leasehold and instead carves out the value of the leasehold interest from the value of the undivided-fee simple, rather than accounting for that leasehold interest in conjunction with the value of the undivided-fee. Because the combined value of the Pyles' simple fee interest subject to the leasehold plus Sun State's leasehold interest is greater than the value of the property were it a fee simple that was not subject to the leasehold, the undivided-fee rule as applied by the Nevada Supreme Court fails to provide just compensation for both of these interests.

The narrow majority of the Nevada Supreme Court stated: "the undivided fee rule provides that the division of a fee into separate interests cannot increase the amount of compensation that the condemnor has to pay for the taking of a fee."[18] But as demonstrated above, the touchstone of takings jurisprudence is precisely the opposite: the combination of all interests into one value

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[18] *Citing United States v. 131.68 Acres of Land, More or Less, Etc.*, 695 F.2d 872, 875 (5th Cir. 1983).

cannot decrease the total compensation below the value that each of the owners have lost collectively.[19]

Here, the District Court concluded that the value of Petitioner Pyles' interest was artificially low, based upon the long-term lease rate. As correctly pointed out in the Nevada Supreme Court dissent, "[t]he governmental taking entity should not be able to take economic advantage of the landowner's decision [to maintain an artificially low lease rate] unless the low rate is dictated by some commercial necessity."[20]

C. Undivided-fee-Rule is Constitutional as Long as a "Safety-Valve" Exists as in Other States

This Court has long recognized that the procedure for arriving at the amount of compensation that is just—the amount that the owners have lost—is not as important as making certain that the full amount that the owners have lost is compensated. Even the market value standard has exceptions—for example, if it is too difficult to calculate, or when its application results in manifest injustice to the property owner.[21]

Thus, the Nevada Supreme Court's majority opinion takes the wrong approach. The majority applies the procedure without allowing the fact-finder to accurately determine the value of the combined property interests. The majority fails to examine whether such a rote application fully compensates the owners for their lost property interests. As found by the district court, the

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[19] *Boston Chamber of Commerce v. Boston*, 217 U.S. 189, 195, 30 S.Ct. 459 (1910); *United States v. 50 Acres of Land*, 469 U.S. 24, 29, 105 S. Ct. 451 (1984).

[20] *Clark County v. Sun State Properties*, 119 Nev. Adv. Op. No. 36 (2003) at p. 10, Maupin, J., dissenting.

[21] *United States v. Cors*, 337 U.S. 325, 332, 69 S. Ct. 1086 (1949); *United States v. Commodities Trading Corp.*, 339 U.S. 121, 123, 70 S. Ct. 547 (1950).

compensable value without separating and accounting for the interests falls far short. The Nevada Supreme Court ignores this problem and asks: "But if the undivided-fee rule fails to withstand constitutional muster, then why is it the majority approach in federal and state courts?"[22]

Of course, this is a red herring, because the statute is not facially unconstitutional. The statute is constitutional any time that the undivided-fee rule provides a valuation equal to the value of the property interest that the owner or owners have lost. However, it is unconstitutional as applied in this case. This is because the sum of each of the property interests, including the encumbrances as they truly exist (as found by the district court), is substantially more than the amount that the property is valued at when one pretends that there are no encumbrances at all.

In the vast majority of instances—where a long-term lease rate is not artificially lower than the market lease rate—the undivided-fee rule yields the fair market value of a parcel of property. But in instances, such as the one in this case, the undivided-fee rule as applied by the Nevada Supreme Court violates the Constitution and is, in fact, not the majority rule. As shown *infra*, most states do not adhere to the undivided-fee rule so strictly that they ignore the demands of the Fifth Amendment to the United States Constitution. Most states provide some "safety-valve" to reconcile the undivided-fee rule with the need to provide just compensation where such compensation would be otherwise lacking.

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[22] *Clark County v. Sun State Properties*, 119 Nev. Adv. Op. No. 36 (2003) at p. 5, (citing cases from Alabama, Colorado, Indiana, Kansas, Montana, New York, Oregon and Wisconsin).

California provides a prime example of a state that has a statute identical to Nevada Revised Statute 37.115,[23] and yet judicially interprets that statute so that it comports with the requirements of the Fifth Amendment. California appellate courts support both the undivided-fee rule and the aggregate-of-interests rule within the framework of the statute. In *People v. Lynbar, Inc.*, 253 Cal. App. 2d 870 (Cal.App. 1967), California's appellate court was mindful of the statutory language and distinguished "a valuation of the fee as a whole" from "valuation of that fee in an undivided state."[24] This is an important distinction. As a different California appellate court found: "the assumption on which the undivided-fee rule is based, which is that the aggregate values of the individual separate interests in the property equal the value of the property as if it were owned by one person" * * * "is frequently not true."[25]

This important point was critical to the dissent's analysis in the present case: "Thus as in the *American Savings & Loan* hypothetical, the aggregate [fair market] value[s] of the separate estates exceeds the fair market value of the fee interest valued by itself. Therefore, to withstand constitutional muster and award just compensation, the fee and leasehold estates must be appraised separately and their values aggregated. The interpretation of NRS 37.115 by the majority fails to provide for just compensation."[26]

California handles this problem in a manner that ensures just compensation for its citizens. In a situation where either the condemnor or the condemnees would be

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[23] See Cal. Civ. Proc. Code §1246.1

[24] *People v. Lynbar, Inc.*, 253 Cal. App. 2d 870, 879 (Cal.App. 1967).

[25] *County of Los Angeles v. American Savings & Loan Assoc.*, 26 Cal. App. 3d 7, 11 (Cal.App. 1972).

[26] *Clark County v. Sun State Properties*, 119 Nev. Adv. Op. No. 36 (2003) at p. 12, Gibbons, J., dissenting.

enriched by the condemnation; California resolved the issue by invoking the undivided-fee rule to the advantage of the private property owner when the value of the property interests is greater under the undivided-fee rule. In the other situation, if the condemnee would suffer a loss because of the condemnation under the undivided-fee rule, California denounced the undivided-fee rule, again to the advantage of the private property owner.[27]

California recognizes instances where strict adherence to the undivided-fee rule fails to provide just compensation, and in such instances California examines the fair market value of each separate interest to arrive at the total fair market value of all interests, rather than neglecting or ignoring an interest altogether. Thus, while California is an undivided-fee rule state, California's interpretation of the undivided-fee rule passes constitutional muster in situations such as the one in this case.

California is not alone in this approach. In fact, some of the states that the Nevada Supreme Court cited[28] as adhering to the undivided-fee rule use it only as a general rule, but follow an approach more similar to California than to Nevada when faced with multiple interests in land. For example, one of the states that the Nevada Supreme Court cited as adhering to the undivided-fee rule is New York. But the New York Court of Appeals has stated: "The appraisers in such a case may pursue either one of two methods. They may appraise the entire value of the premises and then apportion such value among the fee owners and tenants, or they may in the

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[27] Talley, Mike, "The Undivided Fee Rule In California," 20 Hastings L.J. 717, 734 (1968-69).

[28] In its opinion, the Nevada Supreme Court cited Alabama, Colorado, Indiana, Kansas, Montana, New York, Oregon and Wisconsin as examples of states that establish the undivided-fee rule as the majority rule.

first instance appraise the value of each separate interest and thus ascertain the entire value."[29]

New York's court of last resort recognizes that "[t]here are also cases where the aggregate value of the several interests exceeds the value of the unencumbered fee where the court disregarded the unencumbered or undivided-fee rule in construing a statute *."[30] As the New York Court of Appeals concluded, ultimately "the separate interests must eventually be appraised and stated separately."[31]

Yet another state that the Nevada Supreme Court cites as following the undivided-fee rule is Montana. But Montana's Supreme Court has stated that the procedural requirements of its similar statute "have been liberally implemented" such that juries do not need to "first decide the whole compensation due before apportioning the award."[32] The Montana Supreme Court reasoned: "To send this case back for a new trial simply because the jury did not first express the damage in one sum would be the height of shortsightedness and an utter waste of time."[33]

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[29] *Matter of Trustees of New York & Brooklyn Bridge*, 137 N.Y. 95, 97, 32 N.E. 1054 (1893).

[30] *Arlen of Nanuet, Inc. v. State of New York* 26 N.Y.2d 346, 365, 258 N.E.2d 890 (1970), Breitel, J., dissenting on different grounds, citing *Baltimore v. Latrobe*, 101 Md. 621, 61 A. 203 (1905); *State ex rel. McCaskill v. Hall*, 325 Mo. 165, 172, 28 S.W.2d 80 (1930); *see, also, People ex rel. Department of Public Works v. Lynbar, Inc.*, 253 Cal. App. 2d 870 (1967).

[31] *Matter of Trustees of New York & Brooklyn Bridge*, 137 N.Y. 95, 97, 32 N.E. 1054 (1893).

[32] *Department of Highways v. Hy-Grade Auto Court*, 169 Mont. 340, 346, 546 P.2d 1050 (1976).

[33] *Department of Highways v. Hy-Grade Auto Court*, 169 Mont. 340, 346, 546 P.2d 1050 (1976), *quoting State Highway Comm'n v. City Service Co.*, 142 Mont. 559, 563, 385 P.2d 604 (1963).

Another state relied on by the Nevada Supreme Court, Colorado, also differs from Nevada in its approach. Colorado's Supreme Court stated: "The undivided basis rule, as applied in Colorado and as distinguished from the undivided-fee rule adopted in some states, does not ignore the value which an encumbrance may add to or subtract from the fair market value of the property as a whole."[34] Citing California's *Lynbar* case, (the case rationale Nevada rejected in this case), the Colorado Supreme Court held that: "[t]he [undivided-fee rule in Colorado] contemplates that where the contract rental adds to the fair market value of the property, evidence of that rental is relevant in determining the compensation to be paid."[35]

The highest court in another state, Alabama, similarly found that "it is taken for granted that the sum of the values of the divided interest will be exactly equal to the value of the fee as embodied in the total award" but "[i]n reality [] the results of a valuation of the undivided estate *is often* that the total compensation is materially less than an amount sufficient to indemnify the separate claimants, leading one authority to analogize that in that case, the court finds itself in the place of the head of the household who must superintend the carving up and distribution of a chicken which is really not big enough to go around." [Emphasis added].[36]

Thus, under the approach taken by most states, it is very clear why the undivided-fee rule withstands constitutional muster. Many courts with an undivided-fee statute similar to Nevada's, apply their undivided-fee rule as California, Colorado, New York and Montana

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[34] *Montgomery Ward & Co. v. City of Sterling*, 185 Colo. 238, 243, 523 P.2d 465 (1974).
[35] *Montgomery Ward & Co. v. City of Sterling*, 185 Colo. 238, 243, 523 P.2d 465 (1974).
[36] *Harco Drug, Inc. v. Notsla, Inc.*, 382 So. 2d 1, 5-6 (Ala. 1980).

apply it—with a "safety valve" to reach the constitutional and just result of providing full compensation for the amount that each owner has lost.[37]

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[37] *Also, see, e.g., City of Phoenix v. Wilson*, 21 P.3d 388, 393 (Ariz. 2001) (the proper method of valuation of condemned lands cannot be rigidly set by the usage of a single formula and that there are various ways to value property that are appropriate depending on the circumstances of each case); *Fulton County v. Funk*, 463 S.E.2d 883 (Ga. 1995), (undivided-fee rule was to be applied in Georgia, unless the property encumbered by a lease is unique in character); *Chouinard v. City of East Point*, 514 S.E.2d 220 (Ga. 1999) (property is unique in character in Georgia when unencumbered fair market value will not afford just and adequate compensation); *Wilson v. Fleming*, 31 N.W.2d 393 (Iowa, 1948), (Iowa separately assesses damages for lessors and lessees with interest in the same property); *Heritage Realty, Inc. v. Mayor and City Council of Baltimore*, 248 A.2d 898 (Md. 1969), (when the values of two interests in the same property are more than the worth of the property if owned by one person, then the Constitution requires that each interest is compensated fully for the amount of his interest taken); *Rite Media, Inc. v. Secretary of the Massachusetts Highway Dept.*, 712 N.E.2d 60 (Mass. 1999), (when condemned property is subject to separate interests, Massachusetts aggregates the interests to reach the total amount of compensation and considers that amount the fair market value of the entire interest in the property); *Silver Creek Drain District v. Extrusions Division, Inc.*, 663 N.W.2d 436, 442 (Mich. 2003), (fair market value is not determined by formulas or artificial rules, but rather sound judgment and discretion based upon consideration of all the relevant facts in a particular case); *State ex rel. McCaskill v. Hall*, 28 S.W.2d 80 (Mo. 1930), (when the damages to various interests added together exceeded the value of property as a whole, the particular interests should be separately appraised, because the owner is entitled to be compensated for the amount of his interest taken); *State v. Platte Valley Public Power & Irrigation District*, 23 N.W.2d 300 (Neb. 1946), (the measure of compensation to each owner must be that which he has lost * * * those courts which have held that the sum of the separate values of the divided interest may not exceed the value of the unencumbered whole have at that point abandoned the rule that the measure is what had the owner lost and applied the rule that the measure is what had the taker gained); *Garella v. Redevelopment Authority*, 196 A.2d 344, 347-48 (Pa. 1964), (the fallacy of the unencumbered fee theory is readily demonstrated * * * via an example where a lessee pays a lessor rent worth $114,700 for property worth nothing and that property is subsequently condemned. The undivided-fee rule as applied in Nevada would result in no compensation to the owner for the

This is not, however, how Nevada has applied the undivided-fee rule in this case. The critical point is that the fee simple subject to the leasehold interest, plus the reversion interest, has a value, and that value is the just compensation due to the Pyles. The leasehold has a value, and that value is the just compensation due to Sun State. The district court provided the sum of all of these values as the fair market value to be paid by the County. The amount that the County would pay, however, is substantially reduced when one ignores the leasehold interest altogether and pretends that the property is a fee simple absolute. The evidence shows—and the district court found—that the legal fiction of no encumbrances, in this instance, artificially diminishes the overall value of the property interests.

Under the law of states that the Nevada Supreme Court cites—Colorado, New York, Montana, as well as the law of the state that Nevada rejects, California—the district court's approach was both appropriate and correct. In rejecting these approaches, Nevada has taken a path by which Pyles and Sun State simply cannot obtain fair market value for their interests, as in the *Harco Drug* case in Alabama. In Nevada, the court is not permitted to hear testimony and aggregate the values of these interests to determine the fair market value of the

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worthless property, even though the lease entitled him to $114,700 in rents); *United States v. 250 Acres of Land, More or Less*, 43 F.Supp. 937 (D.C. Tex. 1942), (when private property is taken for public use, the owner or owners must be compensated by determining the value of the property taken from each owner; not only the value of the entire title, but also the value of each separate interest); *Perry v. Thomas*, 22 P.2d 343 (Utah, 1933), (separate interests in one parcel of property are to be separately assessed and compensated). *But see, Green Bay Broadcasting Company v. Redevelopment Authority*, 342 N.W.2d 27 (Wisc. 1983), (applying the undivided-fee rule in the same manner as Nevada, Wisconsin's Supreme Court stated: "the unit rule is designed to protect the interests of the condemnor [the state] and not to protect the interests of a condemnee [an individual property owner].").

property. This distinction matters greatly in all cases where the value of the aggregate of the interests exceeds the value of the undivided-fee. In such instances, it prevents the owners of those separate interests from receiving their just compensation guaranteed by the takings clause of the Fifth Amendment to the United States Constitution.

The Nevada approach offends the takings clause, any time that it works to prevent the owners from receiving the amount that they have lost, in terms of fair market value. In this case, it does just that because on remand the district court is not permitted to consider the added value of the leasehold. The district court's hands are tied to the County's own valuation. As a result, the amount of compensation already determined by the district court to be the fair market value of the property is entirely disregarded.

D. As applied by the Nevada Supreme Court, N.R.S. 37.115 is Unconstitutional Because There is No "Safety Valve" to Provide Just Compensation

In circumstances such as the case *sub judice*, the legal fiction of a fee simple results in a disproportionately discounted value and diminishes the overall value without regard for the leasehold value. If valued in a just manner, however, the fair market value would equal the value of the fee subject to the leasehold with its reversion, plus the value of the leasehold. An application of the undivided-fee rule that diminishes the overall value of the property interests leaves those multiple interests substantially, and unjustly, injured without adequate compensation, in violation of the Fifth and Fourteenth Amendments.

The method of valuation employed in Nevada, as found by the district court, results in Clark County receiving a

windfall. "The County conceded that its valuation of the fee simple value of the condemned property was not very different from that advanced by the defendants—approximately $2,000,000.00. The real disagreement between the two sides concerns the valuation of the Sun State leasehold interest: the County did not value this interest at all, while the defendants produced evidence of its valuation [at $898,000]."[38] The district court found that the fair market value of the property interests necessarily includes the value of the leasehold. The district court found that the fee simple subject to the leasehold plus the reversion, added together with the value of the leasehold, exceeded the value of the same property if it were not subjected to any encumbrances.

Three different valuation experts testified at trial: Ms. Lowe, for Sun State; Mr. Rothenberg, for both Sun State and Pyles; and Mr. Kiehlbauch for Clark County. Ms. Lowe determined the fair market value of the property by pretending as if there were no leasehold in existence and did not determine whether there would be a different value were she to account for the interests separately—a fee simple subject to a leasehold plus the leasehold.[39] Mr. Rothenberg determined the fair market value of the property by determining the value of the fee simple subject to the leasehold, and then separately valuing the leasehold, and adding those subparts together.[40] Mr. Kiehlbauch determined the fair market value of the property in similar fashion to Ms. Lowe—by pretending as if there were no leasehold in existence.[41]

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[38] Findings of Fact and Conclusions of Law, *County of Clark v. Sun State Properties, Ltd.*, Case No. A346912, District Court, Clark County, Nevada, filed March 13, 2000. (App. 4).

[39] Trial transcript, Nov. 30, 1999, pp. 27-45.

[40] Trial transcript, Nov. 30, 1999, pp. 66-76, 116-132, 158.

[41] Trial transcript, Nov. 30, 1999, pp. 176-226.

Ms. Lowe determined the value of the Pyles fee to be approximately $1,148,000.00, which she would apportion as $885,000.00 to Sun State for its leasehold interest, and $263,000.00 to the Pyles for the balance.[42] Mr. Kiehlbauch determined the value of the Pyles's property to be approximately $984,500.00, and gave no opinion on apportionment.[43] Mr. Rothenberg, however, determined that the value of the leasehold interest was $1,000,000.00, and the value of the fee subject to the leasehold plus the value of the remainder fee in 2018 brought back to present value was $1,030,000.00.[44]

Mr. Rothenberg was the only expert to assess the value of the Pyles's interest. Both Ms. Lowe and Mr. Kiehlbauch considered only what the market value might be were there no leasehold, and then Ms. Lowe went further and in fact carved out what of that amount was the value of Sun State's leasehold—leaving Pyles almost $800,000.00 short based on her evaluation. Mr. Kiehlbauch, Clark County's expert, was asked about this shortfall:

> Q: What happens and where is all of the bargained for expectation, anticipation, the value of the improvements, the anticipated increased rents in this lease, they just vanished?
>
> A: Correct.[45]
>
> ***
>
> A: There's value in use. There's value to a particular owner. There is value to a particular purchaser and these values do

[42] Trial transcript, Nov. 30, 1999, p. 45.
[43] Trial transcript, Nov. 30, 1999, p. 199.
[44] Trial transcript, Nov. 30, 1999, p. 66, 76, 129, 132, 141.
[45] Trial transcript, Nov. 30, 1999, p. 234.

not conform to market value * * * they are not appropriate in condemnation.[46]

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A: You are considering it from the viewpoint of a third-party purchaser. What would * * * John Q. Public, what would he pay for the property? Not what the current occupant would pay for it, not what the seller would [sell] it for, but what would the most profitable purchase price be under those conditions set forth in the definition of fair market value.[47]

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Q: * * * In so far as the remainder of that lease goes, and the value, the expectation and the increased rents and business forecast, all of that is lost to the tenant?

A: The tenant in this instance suffers a loss, and there is a methodology for measuring the amount of that loss * * * .[48]

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Q: * * * the tenant here suffers a loss, you try to adjust that by then taking away from the value of the property to the left of the snapshot [in time]?

A: Well, you have a value that must be distributed between the two holders, so yes,

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[46] Trial transcript, Nov. 30, 1999, p. 235.
[47] Trial transcript, Nov. 30, 1999, p. 236-237.
[48] Trial transcript, Nov. 30, 1999, p. 238.

> when you affect one [interest], it automatically affects the other because the two total the total value.[49]

Mr. Kiehlbauch clearly believed that the perspective is not "what did the owner lose in terms of fair market value," but rather "what would John Q. Public pay for the property." Mr. Kiehlbauch's perspective is entirely backwards from a constitutional standpoint. "What compensation is just" is "the amount that the owners have lost"—not "the amount that John Q. Public would pay."

Here there are two property interests—Sun State's leasehold, and the Pyles Trust's fee simple subject to the leasehold, plus the reversion. This is what Sun State and the Pyles Trust are losing. If John Q. Public were to buy the property in fee simple absolute, he would have to buy the fee subject to the leasehold, pay for the reversion interest, and then also buy the leasehold subject to a lease premium for the value of the under-market value of the lease. That total John Q. Public would pay is not the same total as similar properties that are not subject to any leaseholds, much less leaseholds under market value. The total that John Q. Public would have to pay to acquire this property, as it existed at the time of the condemnation, is much more.

Sun State's attorney indicated that there are two market values at work here—a statutory market value and a true market value. The statutory market value is artificial. There can be no true assessment of market value of an encumbered property where encumbrances and other legal property rights are ignored and discounted. The true market value is one in which the actual property

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[49] Trial transcript, Nov. 30, 1999, p. 239.

rights are evaluated and totaled.[50] N.R.S. 37.115 does not demand that property rights be ignored and discounted. Yet that is how the Nevada Supreme Court has applied it here. The Fifth and Fourteenth Amendments to the United States Constitution instead demand that the Courts determine what the owner actually lost in terms of fair market value, and compensate that loss.

Under the Nevada Supreme Court's reversal of the District Court and its strict application of the undivided-fee rule, legitimate property rights are ignored and discounted, and there is never any determination what an owner has actually lost. This leaves only a *pro rata* approach to partial compensation of the combined loss, because the aggregate loss exceeds the market value as determined by ignoring the below-market leasehold. As the Alabama court indicated in *Harco Drug, supra*, the court is left with a situation where it is carving up and distributing compensation that is really not big enough to go around.

E. N.R.S. 37.115 Should Be Harmonized with the Fifth and Fourteenth Amendments

The Nevada Supreme Court dissent suggests the correct course of action. While Nevada Revised Statute 37.115 codifies the undivided-fee rule, it merely requires that a two-tiered approach to compensation be used. Such an approach was used by the district court—first, in determining the total amount for Clark County to provide as compensation, and then subsequently in apportioning that total amount. Aggregating the interests of the defendants Pyles and Sun State to determine the fair market value of the fees taken is in no way forbidden by Nevada Revised Statute 37.115.[51] The District Court

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[50] Trial transcript, Nov. 30, 1999, p. 243-250.

[51] *See* NRS 37.115; *See Clark County v. Sun State Properties*, 119 Nev. Adv. Op. No. 36 (2003) at p.10, Maupin, J., dissenting. (App. 1).

adhered strictly to the language of Nevada Revised Statute 37.115 in taking this two-tiered approach and still met the Constitutional requirements under the takings clause of the Fifth Amendment.

In the judgment of the District Court, counting the value of the fee simple subject to the leasehold plus the value of the reversionary interest and adding to that total the value of the leasehold interest was the most fair way to determine the amount of just compensation.

CONCLUSION

The Nevada Supreme Court is wrong when it states that "if the statute results in unfairness, it is for the Legislature, not this court, to change the statutory scheme." It is for the Nevada Supreme Court to examine whether the statute can be applied in harmony with the United States Constitution. If not, it is the duty of the Nevada Supreme Court to strike the statute as unconstitutional. If so, it is the duty of the Nevada Supreme Court to ensure that courts in Nevada apply the statute within the boundaries of the Constitution.

Here, the Nevada Supreme Court refused to examine whether its application of the undivided-fee rule would provide just compensation to the owners of the property interests. The evidence shows that the property owners are not going to receive the amount that their individual interests are worth. Under this ruling, Nevada courts are not required to ensure that property owners are given just compensation in takings cases; they are merely required to follow the statutory scheme no matter how unjust or unfair the compensation may be, because that is what the Nevada Legislature has demanded. This ruling cannot stand, if the Takings Clause means what it says.

For the foregoing reasons, petitioner submits that this Court should grant review in this case to reverse the holding of the Supreme Court of the State of Nevada with respect to its interpretation of Nevada Revised Statute § 37.115, which interpretation otherwise means that every instance of condemnation of property results in the use of the undivided-fee rule, even when the compensation in eminent domain cases such as the case *sub judice* is patently unjust and contrary to the Fifth and Fourteenth Amendments of the United States Constitution. Petitioner would ask this Court to reinstate the decision of the District Court of the State of Nevada and its allocation of compensation as was just and intended by the framers of the Bill of Rights.

Respectfully submitted,

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October 17, 2003

119 Nev., Advance Opinion 36

IN THE SUPREME COURT OF
THE STATE OF NEVADA

COUNTY OF CLARK, A POLITICAL SUBDIVISION OF THE STATE OF NEVADA,
Appellant,
vs.
SUN STATE PROPERTIES, LTD., A NEVADA LIMITED PARTNERSHIP; AND RUTH PYLES, TRUSTEE OF THE CLARENCE AND RUTH PYLES TRUST,
Respondents.

No. 35856

[DATE STAMP]
FILED
JUL 21 2003
JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY /s/ J. Richards
CHIEF DEPUTY CLERK

Appeal from a judgment in an eminent domain action. Eighth Judicial District Court, Clark County; James C. Mahan, Judge.

Reversed and remanded.

David J. Roger, District Attorney, and Michael L. Foley, Deputy District Attorney, Clark County,
for Appellant.

Carl E. Lovell Jr., Las Vegas,
for Respondent Pyles.

Mushkin & Hafer and Mark C. Hafer and Michael R. Mushkin, Las Vegas,
for Respondent Sun State Properties.

Brian Sandoval, Attorney General, and Margaret E. Kerr,
Deputy Attorney General, Carson City,
for Amicus Curiae State of Nevada.

BEFORE THE COURT EN BANC.

OPINION

By the Court, ROSE, J.:

In this appeal, we consider the proper procedure for determining just compensation in an eminent domain action when there are various interests involved in the condemned property. We hold that the eminent domain statutes codified the undivided-fee rule, which requires the court to first determine the value of the property as a whole, and in a subsequent hearing, to apportion the award among the various interests. Accordingly, we conclude that the district court erred when it first valued the various interests in order to determine the just compensation for the condemned property, and therefore, we reverse and remand for a new trial.

We also consider whether a condemnee is entitled to damages for lost profits resulting from the condemnor's delay in not bringing the action to trial within two years from when the action was filed. We hold that the condemnee may recover damages for lost profits when the condemnee has demonstrated that the condemnor caused unreasonable delay in bringing the action to trial. Because the record does not indicate what caused the delay, we direct the district court, on remand, to revisit this issue.

FACTS

On June 7, 1995, the County of Clark filed a complaint in condemnation of real property to acquire two parcels of land, which contained apartment units, located in downtown Las

Vegas, in order to build a jail facility. Sun State Properties, Ltd., owned one of the parcels in fee simple. Clarence and Ruth Pyles, trustees of The Clarence and Ruth Pyles Trust (the Pyles), owned the second parcel in fee simple, but the Pyles leased the parcel to Sun State for $500 per month.[1] The lease for the second parcel was for fifty-five years, ending on February 1, 2018.

On July 14, 1995, the district court granted the County's motion for immediate occupancy of the two parcels. The district court also ordered the County to post a cash bond of $1,640,000. Following the parties' stipulation regarding the funds from the cash bond, several lenders that held deeds of trust on the parcels were paid in full, Sun State received $424,724.14, the Pyles received $122,100, and a balance of $77,900 was deposited into an interest-bearing account in trust for Sun State and the Pyles.

Because trial had not commenced within two years, the district court set the valuation date at June 22, 1999, the scheduled trial date. However, trial did not commence until November 30, 1999, because the district court granted the Pyles' motion for a continuance.

At trial, several appraisal experts presented various valuations for the acquired parcels. Shelli Lowe, Sun State's appraisal expert, testified that she valued the whole property, as it existed prior to the taking, at $6,100,000. She next valued the remaining property after the taking at $3,915,000. She then valued the parcels acquired by the County at $1,900,000 and Sun State's severance damages at $285,000 – the diminished value of Sun State's remaining parcels that were part of the

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[1]Sun State was the successor lessee on a lease that was executed in1963.

parcels being taken.[2] Lowe concluded that total just compensation for the acquired parcels and Sun State's severance damages would be $2,185,000.

Upon Sun State's request, Lowe provided an addendum to her appraisal report wherein she valued the leased fee interest and leasehold interest separately. In doing so, Lowe reviewed the rental value of the lease and the term of the lease. Before testifying to the separate valuations, Lowe opined that the improvements on the land would have no value at the end of the lease because, at the end of the term, the improvements would be forty-eight years of age. Nevertheless, Lowe valued the leased fee at $263,000 and the leasehold at $885,000.

Edward Rothenberg, a real estate appraiser, testified on behalf of Sun State and the Pyles. He appraised the leased fee interest and the leasehold interest separately, explaining that the two interests must be valued separately because the fee simple estate does not exist as long as it is subject to a long-term lease; thus, the fee simple estate cannot be sold. Rothenberg valued the leased fee at $1,030,000 and the leasehold at $1,000,000, which equates to $2,030,000 for the second parcel. He also estimated Sun State's damages for lost profits from immediate occupancy in June 1995 to the valuation date of June 1999 at $465,600.

John Kiehlbauch, the County's appraiser, testified that he valued the whole property before the taking at $5,940,000. He next valued the remaining property after the taking at $3,980,000. He then valued the parcels acquired by the County at $1,790,000 and apportioned the value: the Pyles' interest at $984,000 and Sun State's interest at $805,500. He calculated Sun State's severance damages at $170,000. Kiehlbauch

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[2]See M&R Investment Co. v. State Dep't Transp., 103 Nev. 445, 449, 744 P.2d 531, 534 (1987) (noting that "severance damages are awarded when a partial taking of a landowner's property occurs").

testified that the total just compensation for the acquired parcels and Sun State's severance damages equaled $1,960,000.

Verne Cox, the Pyles' appraiser, did not testify at trial, but his appraisal report was submitted at trial. He valued the fee simple at $1,050,000 and apportioned this value as follows: the lease fee at $251,000 and the leasehold at $799,000.

At the conclusion of the trial, the County argued that under NRS 37.115, the district court was required to use the undivided-fee rule, whereby the property is valued under the statutory definition of fair market value, and then, in a subsequent hearing, the court is required to apportion the compensation among the various interests. On the other hand, Sun State and the Pyles argued that the district court was required to value the aggregate of their various interests in the first hearing, and in a subsequent hearing, the court was required to apportion the interests. Thereafter, the district court entered a written decision rejecting the undivided-fee rule as the law in Nevada, ruling that NRS 37.115 only sets forth the procedures in a condemnation action. In so ruling, the district court relied on People v. Lynbar, Inc.,[3] a California appeals court case that construed a statute similar to NRS 37.115. The district court explained that the Lynbar, Inc. court construed the statute as a procedural statute, rather than as a substantive rule, such as the undivided-fee rule.

The district court found that Sun State's leasehold interest was a compensable interest and accepted Sun State's and the Pyles' valuation, stating that it was not contradicted at trial. Thus, the district court valued their interests at $3,634,000. Following NRS 37.115, the district court ordered the parties to present additional evidence on February 7, 2000, regarding the apportionment of Sun State's and the Pyles' interests.

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[3]62 Cal. Rptr. 320 (Ct. App. 1967).

After the apportionment hearing, the district court entered its findings of fact and conclusions of law. The district court made the following awards: $1,868,000 as just compensation for Sun State's fee interest in the first parcel and for its leasehold interest in the second parcel; $250,000 in severance damages to Sun State; $462,000 in damages to Sun State from the date of immediate occupancy; $1,030,000 as just compensation for the Pyles' leased fee interest; and $24,000 in damages to the Pyles from the date of immediate occupancy.

In addition to challenging the district court's procedure in determining the just compensation, the County challenges the district court's award of damages, which the County claims were inappropriately awarded as lost profits.

DISCUSSION

Standard of review

This court has consistently provided that the district court's findings of fact will not be disturbed on appeal if they are supported by substantial evidence.[4] But the district court's conclusions of law are reviewed de novo.[5]

Whether NRS 37.115 codified the undivided-fee rule is an issue of statutory construction. Statutory construction involves a question of law that this court reviews de novo.[6] This court gives effect to the legislature's intent by looking first

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[4]See, e.g., Pandelis Constr. Co. v. Jones-Viking Assoc., 103 Nev. 129, 130, 734 P.2d 1236, 1237 (1987); Hobson v. Bradley & Drendel, Ltd., 98 Nev. 505, 506-07, 654 P.2d 1017, 1018 (1982).

[5]See, e.g., Blaich v. Blaich, 114 Nev. 1446, 1447-48, 971 P.2d 822, 823 (1998); Bopp v. Lino, 110 Nev. 1246, 1249, 885 P.2d 559, 561 (1994).

[6]See A.F. Constr. Co. v. Virgin River Casino, 118 Nev. ___, ___, 56 P.3d 887, 890 (2002).

to the plain language of the statute.[7] But if the statutory language is ambiguous or fails to address the issue, this court construes the statute according to that which "reason and public policy would indicate the legislature intended."[8]

Undivided-fee rule

Under federal and state constitutional law, condemnation of private property requires the condemnor to pay just compensation.[9] Constitutional principles provide that just compensation is measured by the fair market value of the condemned property.[10] NRS 37.009(6) defines fair market value as the "most probable price," which this court has held is constitutional.[11]

Regarding the evidence that the trier of fact must consider in a condemnation action, NRS 37.110, which is titled "Ascertainment and assessment of damages," provides in pertinent part:

> The court, jury, commissioners or master must hear such legal testimony as may be offered by any of the parties to the proceedings, and thereupon must ascertain and assess:

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[7]See id.

[8]State, Dep't Mtr. Vehicles v. Vezeris, 102 Nev. 232, 236, 720 P.2d 1208, 1211 (1986) (internal quotations and citation omitted), quoted in Salas v. Allstate Rent-A-Car, Inc., 116 Nev. 1165, 1168, 14 P.3d 511, 514 (2000).

[9]County of Clark v. Buckwalter, 115 Nev. 58, 61-62, 974 P.2d 1162, 1164 (1999).

[10]United States v. 50 Acres of Land, 469 U.S. 24, 25 (1984).

[11]Buckwalter, 115 Nev. at 62, 974 P.2d at 1164-65.

> 1. The value of the property sought to be condemned and all improvements thereon pertaining to the realty, and of each and every separate estate or interest therein; if it consists of different parcels, the value of each parcel and of each estate or interest therein shall be separately assessed.

Additionally, this court has provided, "'The determination of market value includes the consideration of any elements that fairly enter into the question of value which a reasonable businessman would consider when purchasing.'"[12]

In determining the fair market value when there are various interests in the condemned property, NRS 37.115 provides for a bifurcated proceeding:

> Where there are two or more estates or divided interests [in] property sought to be condemned, the plaintiff is entitled to have the amount of the award for such property first determined as between plaintiff and all defendants claiming any interest therein. The respective rights of such defendants in and to such award shall be determined by the court, jury, or master in a later and separate hearing in the same proceeding and the amount apportioned by order accordingly.

The County and the State, as amicus curiae, contend that the Legislature codified the undivided-fee rule in NRS 37.115, requiring the court to first determine the fair market value of the property without any encumbrances, and then in a subsequent hearing, to apportion the value among the various interests. The district court, however, rejected the County's argument at trial, and applied the aggregate-of-interests rule.

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[12]Schwartz v. State, Dep't of Transp., 111 Nev. 998, 1002-03, 900 P.2d 939, 942 (1995) (quoting State ex rel. Dep't of Hwys. v. Linnecke, 86 Nev. 257, 261-62, 468 P.2d 8, 10-11 (1970)).

When there are various interests in the condemned property, the majority of the jurisdictions applies the undivided-fee rule.[13] The undivided-fee rule provides that condemned property is first valued as though it was unencumbered, and in a subsequent hearing, the total award is apportioned among the various interests. The reasoning behind the rule is:

> The duty of the public to make payment for the property which it has taken is not affected by the nature of the title or by the diversity of interests in the property. The public pays what the land is worth, and the amount so paid is to be divided among the various claimants, according to the nature of their respective estates.[14]

Under the undivided-fee rule, the condemnor has no interest in the apportionment hearing because it has met its obligation when it pays the court the total award.[15] Furthermore, the undivided-fee rule provides that "the division of a fee into separate interests cannot increase the amount of compensation

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[13]See, e.g., Harco Drug, Inc. v. Notsla, Inc., 382 So. 2d 1, 5-6 (Ala.1980); Gifford v. City of Colorado Springs, 815 P.2d 1008, 1011 (Colo. Ct.App. 1991); J.J. Newberry Co. v. City of East Chicago, 441 N.E.2d 39, 43 (Ind. Ct. App. 1982); City of Manhattan v. Kent, 618 P.2d 1180, 1184-85 (Kan. 1980); Department of Highways v. Hy-Grade Auto Court, 546 P.2d 1050, 1053-54 (Mont. 1976); Great Atlantic & Pacific Tea Co. v. State, 238 N.E.2d 705, 710 (N.Y. 1968); Urban Renewal Agency, Etc. v. Wieder's Inc., 632 P.2d 1334, 1336 (Or. Ct. App. 1981); Van Asten v. State, 571 N.W.2d 420, 422 (Wis. Ct. App. 1997) (noting that the undivided-fee rule stems from "the common law theory that anything that was attached to a freehold was annexed to and considered to be a part of it"); see also 4 Julius L. Sackman, Nichols on Eminent Domain § 12.05[1] (rev. 3d ed.2002) (cases cited therein).

[14]4 Sackman, supra note 13, § 12.05[1], at 12-104; see also 1 Lewis Orgel, Valuation Under the Law of Eminent Domain § 109 (2d ed. 1953).

[15]Kent, 618 P.2d at 1184.

that the condemnor has to pay for the taking of the fee."[16]

On the other hand, the undivided-fee rule is not universal because a minority of jurisdictions applies the aggregate-of-interests rule or the summation rule when there are various interests in the condemned property.[17] Under the aggregate-of-interests rule, each of the various interests that contribute to the value of the real property are valued separately, and the total represents the market value of the real property.[18] Notably, "'[u]se of this method of appraisal has generally been rejected since it fails to relate the separate value of the improvements to the total market value of the property.'"[19]

We hold that NRS 37.115 codified the undivided-fee rule. The plain language of the statute provides that in the first hearing, the just compensation award is to be determined between the condemnor and all the condemnees. We note that in this first hearing, the existence of the encumbrance on the property, i.e., the lease, is relevant in valuing the property as a

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[16]U.S. v. 131.68 Acres of Land, More or Less, Etc., 695 F.2d 872, 875 (5th Cir. 1983).

[17]See 4 Sackman, supra note 13, § 12.05[2], at 12-112; see also 1 Orgel, supra note 14, § 109, at 464 ("The general statement is... true in implying that out of every hundred cases in eminent domain, there will probably be only a relatively few in which the total compensation has not been ostensibly based on a valuation of the land as if it were held in undivided fee simple.").

[18]See Kent, 618 P.2d at 1184.

[19]Id. (quoting Matter of Condemnation of Land, Etc., 548 P.2d 756, 760 (Kan. 1976)).

whole.[20] The statute further provides that in the second hearing, the court must apportion the award based on the value of each condemnee's interest. In this hearing, NRS 37.110 becomes relevant because the value of each property must be ascertained and assessed in order to apportion the total award for the condemned property.

In rejecting the undivided-fee rule as Nevada law, the district court relied on People v. Lynbar, Inc.,[21] which respondents contend was appropriate. In Lynbar, Inc., the California Court of Appeal addressed an argument similar to the argument the County raises in this appeal – the bifurcation-of-proceeding statute, which parallels NRS 37.115, required the court to first determine the fair market value as though the property were unencumbered, regardless of the fact that on the date of valuation the various interests in the property actually enhanced the fair market value.[22] The court held that the statute was exclusively a procedural statute that did not embody either the undivided-fee rule or the aggregate-of-interests rule, but permitted the condemnor to request that the total award of the property be determined first, and then in a subsequent proceeding, be apportioned among the various interests.[23]

After holding that the statute was procedural, the court addressed the issue of what the "whole" embodies when the condemnor elects to bifurcate the proceedings: "It seems to us

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[20]See Schwartz v. State, Dep't of Transp., 111 Nev. 998, 1002-03, 900 P.2d 939, 942 (1995) (stating that the court may consider any element that is relevant in determining the fair market value of the condemned property); see also Kent, 618 P.2d at 1185; Hy-Grade Auto Court, 546 P.2d at 1053; Van Asten, 571 N.W.2d at 422.

[21]62 Cal. Rptr. 320 (Ct. App. 1967).

[22]Id. at 324.

[23]Id. at 326.

that this whole must be the total of what the various involuntary sellers have to sell and not the undivided fee which the condemnor is seeking to acquire."[24] The court stated that even though the statute provides that the condemnor can seek a total award rather than an award of the various interests independently, the requirements of the statute do not correlate to a requirement that the property be valued as though it had a single owner.[25] Moreover, the court noted that it would be unfair to value the property as unencumbered when it actually is encumbered.[26]

We note that the California Supreme Court has not addressed the issue presented in Lynbar, Inc., and that cases from the California Court of Appeal have been inconsistent on this issue[27] – whether the undivided-fee rule or aggregate-of-interests rule is California law. Based on this and because we

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[24]Id. at 327.

[25]Id.

[26]Id. at 329.

[27]See e.g., New Haven Unified School Dist. v. Taco Bell, 30 Cal. Rptr. 2d 469, 471-72 (Ct. App. 1994) ("Whether or not the lessor and lessee are joined in a single proceeding, these rules will ordinarily result in an aggregate award to both lessor and lessee equal to market value of the property." (citation omitted)); People, Department of Public Works v.Amsden Corp., 109 Cal. Rptr. 1, 4 (Ct. App. 1973) ("Lynbar simply holds that at the valuation stage, all existing leases must be considered as the condemnor must take the property in the condition in which it finds the property on the applicable date."); County of Los Angeles v. American Savings & Loan Ass'n, 102 Cal. Rptr. 439, 442 (Ct. App. 1972) (noting that Lynbar, Inc. takes the approach contrary to the undivided-fee rule, and that California case and statutory law support both the undivided-fee and aggregate-of-interests rules); Costa Mesa Union Sch. Dist. v. Security First Nat. Bank, 62 Cal. Rptr. 113, 117 (Ct. App. 1967) ("Where there are separate interests in the land taken, the property is to be valued as if owned by a single person, regardless of the separate interests therein, subject to apportionment.").

conclude that the plain language of NRS 37.115 codified the undivided-fee rule, we decline to follow the Lynbar, Inc. decision and its reasoning. Thus, we conclude that the district court erroneously applied the aggregate-of-interests rule in reaching the judgment.

Although noting that the fairness of either the undivided-fee rule or aggregate-of-interests rule may be debated, the dissent concludes that to withstand constitutional muster and award just compensation, the aggregate-of-interests rule must be applied when there are various interests in the condemned property. But, if the undivided-fee rule fails to withstand constitutional muster, then why is it the majority approach in federal[28] and state courts?[29] The commentators that have responded to the criticism of the undivided-fee rule have noted that such criticism is flawed because it is based upon faulty valuation techniques and factual patterns examined by the opponents of the undivided-fee rule.[30] In actuality, the proper application of the undivided-fee rule results in an eminently fair award.

Similarly, the dissent's criticism of the undivided-fee rule is flawed. The dissent states that the undivided-fee rule may overlook situations in which there are separate estates, as in the instant case, thus failing to provide just compensation.

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[28]See, e.g., U.S. v. 131.68 Acres of Land, More or Less, Etc., 695 F.2d 872, 875 (5th Cir. 1983); Eagle Lake Improvement Co. v. United States, 160 F.2d 182, 184 (5th Cir. 1947); Meadows v. United States, 144 F.2d 751, 752-53 (4th Cir. 1944); Fain v. United States, 145 F.2d 956, 958 (6th Cir. 1944); Silberman v. United States, 131 F.2d 715, 717 (1st Cir. 1942). See also 4 Sackman, supra note 13, § 12.05[1] (cases cited therein).

[29]See cases cited supra note 13.

[30]See 4 Sackman, supra note 13, § 12.05[4][1], at 12-135 to 12-136; Victor P. Goldberg et al., Bargaining in the Shadow of Eminent Domain: Valuing and Apportioning Condemnation Awards Between Landlord and Tenant, 34 UCLA L. Rev. 1083, 1093 (1987).

However, as the County notes, the district court's application of the aggregate-of-interests rule resulted in an award that far exceeded the value of both parcels before the taking occurred. Lowe, Sun State's appraisal expert, valued the whole property before the taking at $6,100,000, and then valued the remaining property after the taking at $3,915,000. The district court awarded Sun State and the Pyles $3,148,000 in just compensation.[31] Adding the award of just compensation and Lowe's value of the remaining parcels equals $7,063,000. Thus, the district court's just compensation resulted in an award more than what Sun State and the Pyles lost.[32]

The dissent next interprets NRS 37.115 to be a procedural rule. Under the dissent's interpretation, the various interests must be valued separately in the first hearing. If this is true, then what is the purpose of the statutorily mandated second hearing? The dissent ignores the statutory scheme, which clearly provides that in the first hearing the property is valued as a whole, while considering encumbrances on the property in determining the value of the property as a whole; and in the second hearing the just compensation award is apportioned among the various condemnees. The dissent asserts that our interpretation may fairly apply to tenancies, but not to separate estates, such as the instant case. However, the dissent fails to recognize our application of the plain language of NRS 37.115, which clearly states: "Where there are two or more estates or divided interests [in] property sought to be condemned..." If the statute results in unfairness, it is for the Legislature, not this court, to change the statutory scheme.

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[31]The district court actually valued Sun State's and the Pyles' interest at $3,634,000, but the court incorrectly included the awards of $462,000 and $24,000 for lost profits in the just compensation award. The awards for lost profits are separate from the just compensation award.

[32]See Boston Chamber of Commerce v. Boston, 217 U.S. 189, 195 (1910) (noting that the compensation paid for the condemned property should place the property owner in as good a position as before the taking).

Damages for lost profits

The County next contends that the district court erroneously awarded Sun State and the Pyles damages for lost profits from the date of immediate occupancy until the date of valuation. We first recognize that the Legislature has not mandated an award for lost profits within the eminent domain statutes. Regarding the delay in bringing the action to trial, the Legislature has provided:

> [I]f the action is not tried within 2 years after the date of the first service of the summons, and the court makes a written finding that the delay is caused primarily by the plaintiff or is caused by congestion or backlog in the calendar of the court, the date of valuation is the date of the actual commencement of the trial.[33]

The Legislature has defined "primarily" as

> the greater amount, quantity or quality of acts of the plaintiff or the defendant or, if there is more than one defendant, the total delay caused by all the defendants, that would cause the date of the trial to be continued past 2 years after the date of the first service of the summons.[34]

The issue of whether a condemnee is entitled to damages as a result of the condemnor's delay in bringing the action to trial within two years is an issue of first impression. We note, though, that we have stated that in addition to the benefit of the inflated value pursuant to NRS 37.120(1), the condemnee is entitled to prejudgment interest from the date of the taking because the condemnee "has still been deprived of the use of

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[33]NRS 37.120(1).

[34]NRS 37.120(3).

the proceeds that should have been paid at the time of the taking."[35]

In State, Department of Transportation v. Barsy,[36] this court held that the condemnor's precondemnation activities may entitle the condemnee to damages in addition to the compensation for the taking. In Barsy, the Nevada Department of Transportation (NDOT) planned a project which would affect Barsy's property that he was renting to two tenants.[37] After NDOT decided to implement the project, an NDOT representative visited the two tenants, informing them of the imminent project and of the relocation costs and benefits NDOT would pay them.[38] Because NDOT was unable to provide an accurate time frame for acquisition of the property, the two tenants refused to renew their leases, and Barsy was unable to attract new tenants.[39]

Four years after NDOT announced its decision to implement the project, NDOT filed a condemnation action to acquire Barsy's property.[40] Thereafter, Barsy filed a counterclaim, requesting damages for lost rental income caused by the unreasonable delay in commencing the condemnation action. The district court, however, dismissed Barsy's counterclaim.

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[35]County of Clark v. Alper, 100 Nev. 382, 392-93, 685 P.2d 943, 950 (1984).

[36]113 Nev. 712, 719-20, 941 P.2d 971, 976 (1997), overruled on other grounds by GES, Inc. v. Corbitt, 117 Nev. 265, 21 P.3d 11 (2001).

[37]Id. at 715, 941 P.2d at 973.

[38]Id. at 715, 941 P.2d at 974.

[39]Id. at 715-16, 941 P.2d at 974.

[40]Id. at 716, 941 P.2d at 974.

On appeal, this court decided to follow the seminal case of Klopping v. City of Whittier,[41] regarding the rights of property owners who sustain damages as a result of the condemnor's precondemnation activities. This court noted that the California Supreme Court in Klopping: "held that where a condemnor 'acts unreasonably in issuing precondemnation statements, either by excessively delaying eminent domain action or by other oppressive conduct, our constitutional concern over property rights requires that the owner be compensated.'"[42] This court further noted that "[t]he Klopping court ruled that a condemnee must demonstrate that the condemnor acted improperly following a precondemnation announcement by unreasonably delaying action or by other unreasonable precondernnation conduct and that such acts resulted in a decrease in the market value of the property."[43] Following Klopping, this court concluded that when the condemnee meets the evidentiary burden, "the condemnee must be compensated for loss of income due to precondemnation action or publicity."[44] Because this issue presented a question of fact, this court reversed the dismissal of Barsy's claim for precondemnation damages, and remanded the issue to the district court to determine whether NDOT's precondemnation conduct resulted in a decrease in the market value of Barsy's property, requiring an award for lost profits.[45]

Unlike Barsy, Sun State and the Pyles did not request precondemnation damages; rather, they had requested damages

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[41]500 P.2d 1345 (Cal. 1972).

[42]Barsy, 113 Nev. at 720, 941 P.2d at 976 (quoting Klopping, 500 P.2d at 1355).

[43]Id.

[44]Id.

[45]Id. at 720-21, 941 P.2d at 977.

for lost profits resulting from the County's delay in bringing the action to trial. If, after filing an action, the condemnor unreasonably delays in bringing the action to trial within two years, then it would appear consonant with our concerns shown in Barsy that the condemnee receive damages for lost profits caused by such litigation delay.

Although NRS 37.120(1) prescribes that the government must bear the burden of the inflated value when the action has not been brought to trial within two years, it only requires a finding that the condemnor primarily caused the delay, or that congestion or backlog in the court calendar caused the delay. Using our reasoning in Barsy, we hold that the condemnee must meet the more stringent standard set forth in Barsy when there is a claim for lost-profits damages resulting from the litigation delay. Thus, the condemnee must demonstrate that the condemnor caused unreasonable delay in bringing the action to trial by purposely and in bad faith pursuing an unconscionable dilatory course of action during litigation.

Here, the district court failed to make any findings regarding the litigation delay, and the record does not indicate what caused the delay. Therefore, on remand, the district court shall provide Sun State and the Pyles an opportunity to demonstrate that they are entitled to damages because the County unreasonably delayed in bringing the action to trial within two years.

CONCLUSION

NRS 37.115 codified the undivided-fee rule. Because the district court erroneously applied the aggregate-of-interests rule, we reverse the district court's judgment and remand for a new trial.

In addition to receiving the benefit of the inflated value when trial has not commenced within two years, damages for lost profits are permitted when the condemnee demonstrates that the condemnor unreasonably delayed in bringing the action to trial. Even if the condemnee fails to meet this stringent standard, we note that the condemnee is entitled to prejudgment interest from the date of the taking. Because of the ambiguity regarding the cause of the litigation delay, we direct the district court, on remand, to allow Sun State and the Pyles an opportunity to demonstrate that the County unreasonably delayed in bringing the action to trial.[46]

/s/ Rose _____, J.

We concur:

/s/ Agosti _____, C.J.
Agosti

/s/ Becker _____, J.
Becker

/s/ Young _____, Sr.J.
Young

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[46]The Honorable Cliff Young, Senior Justice, was appointed by the court to sit in place of the Honorable Myron E. Leavitt, Justice. Nev. Const. art. 6, § 19; SCR 10.

MAUPIN, J., concurring in part and dissenting in part:

As a general proposition, the undivided-fee rule governs the assessment of damages in condemnation cases brought under Nevada law. However, in those rare cases where the district court concludes that application of the undivided-fee rule may frustrate or prevent an award of just compensation, the district court should have the discretion to utilize the dissent's "aggregate-of-interests" rule in either calculating the award in a bench trial or in crafting instructions in a jury trial. This is one of those rare cases and, as discussed below, we should affirm the judgment rendered in this matter below.

In my view, the district court correctly concluded that the value of the Pyles' interest was artificially low based upon the long-term lease rate. For any number of reasons, business or personal, a landowner may wish to artificially create a low lease rate. The governmental taking entity should not be able to take an economic advantage of the landowner's decision in that regard unless the low rate is dictated by some commercial necessity. Utilization of the "aggregate-of-interests" formula effected just compensation in this case and the fact finder could reasonably conclude that the Pyles' lease rate was not truly reflective of the value of the property.

I appreciate the majority's concern that NRS 37.115 codifies the undivided-fee rule. I believe it does as a general matter, but agree with Justice Gibbons that the "aggregate-of-interests" rule is compatible with the two-tiered approach in the statute and may be used in situations such as that presented here.[1]

/s/ Maupin, J.
Maupin

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[1]I agree with the majority that the damages for lost profits resulting from the condemnor's unreasonable delay in bringing the action to trial are compensable.

GIBBONS, J., with whom SHEARING, J., agrees, concurring in part and dissenting in part:

While I agree with the majority that damages for lost profits resulting from the condemnor's unreasonable delay in bringing the action to trial are compensable, I respectfully dissent from the conclusion that the undivided-fee rule is the only proper means of determining just compensation.

The United States Constitution declares that no private property shall "be taken for public use, without just compensation."[1] The Constitution of the State of Nevada similarly provides that "[p]rivate property shall not be taken for public use without just compensation having been first made."[2] Both have their origins in James Madison's proposed twelve amendments to the United States Constitution presented at the first session of Congress.[3] Madison's proposed amendment stated that "[n]o person shall... be obliged to relinquish his property, where it may be necessary for public use, without a just compensation."[4]

The majority takes no issue with the fundamental principles stated above. Our divergence begins and ends solely on the issue of how just compensation is determined. While the undivided-fee rule is constitutional in most instances, I believe fairness dictates the "aggregate-of-interests" rule be used to determine just compensation when more than one estate is being condemned.

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[1]U.S. Const. amend. V.

[2]Nev. Const. art. 1, § 8, cl. 6.

[3]1 Annals of Cong. 451-52 (Joseph Gales ed., 1789), available at http://memory.loc.gov/ammem/amlaw/lwac.html.

[4]Id.

The majority cites several federal and state cases concluding the undivided-fee rule properly compensated the parties involved.[5] I agree that in most cases, the undivided-fee rule is constitutionally permissible because it produces the same valuation as would the aggregate-of-interests rule. The majority ignores, however, the premise that in unusual circumstances, the undivided-fee rule must be set aside to prevent an unfair and distorted result in favor of the condemnor.

In defense of the undivided-fee rule, the majority implies that commentators suggest the aggregate-of-interests rule "is based upon faulty valuation techniques."[6] The composition of the "commentators" consists of one sixteen-year-old law review article.[7] The majority does not cite a far more recent article concluding the undivided-fee rule is "conceptually flawed" in cases like the one now before the court.[8] Further, the article indicates the undivided-fee rule makes "little sense in some applications."[9]

The majority's contention notwithstanding, fair market value is "not the sole measure" of just compensation."[10] Market value may, or may not, amount to just compensation."[11] This

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[5]See majority opinion ante notes 13 and 28.

[6]See majority opinion ante p. 14.

[7]See majority opinion ante note 30.

[8]Gideon Kramer, What to Do Until the Bulldozers Come? Precondemnation Planning for Landowners, 27 Real Est. L.J. 47, 72 (1998).

[9]Id.

[10]Urban Renewal Agcy. v. Iacometti, 79 Nev. 113, 128 n.10, 379 P.2d 466, 473 n.10 (1963).

[11]Id.

court has previously stated that "'[i]t is difficult to imagine an unjust compensation; but the word "just" is used evidently to intensify the meaning of the word" compensation;" to convey... that the [compensation] shall be real, substantial, full, ample; and no legislature can diminish by one jot the rotund expression of the constitution.'"[12] Despite these words, in most condemnation proceedings the "'most probable price'" is the measure for compensation.[13] Value is determined "as if the government project that resulted in the taking was neither contemplated nor carried out."[14]

In addition to market value, "the court or jury [may] consider[ ] other elements that can fairly enter into the question of value and which an ordinarily prudent business man would consider before forming judgment in making a purchase."[15] One such consideration is "the rental value of the property condemned, as well as the actual rent which the property produces, because such elements of value are material in the determination of 'just compensation for the land taken.'"[16]

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[12]Id. (quoting Virginia and Truckee R. R. Co. v. Henry, 8 Nev. 165, 171-72 (1873)).

[13]County of Clark v. Buckwalter, 115 Nev. 58, 61, 974 P.2d 1162, 1164 (1999) (quoting NRS 37.009(6)).

[14]City of Sparks v. Armstrong, 103 Nev. 619, 622, 748 P.2d 7, 9 (1987) (citing County of Clark v. Alper, 100 Nev. 382, 390, 685 P.2d 943, 948 (1984)).

[15]State v. Shaddock, 75 Nev. 392, 398, 344 P.2d 191, 194 (1959) (citing In re Bainbridge-Unadilla Part 1, State Highway, 5 N.Y.S.2d 988 (Chenango County Ct. 1938)).

[16]Id. at 398, 344 P.2d at 194 (quoting Welch v. Tennessee Valley Authority, 108 F.2d 95 (6th Cir. 1939)).

"Law is not a science, but is essentially empirical."[17] We must compensate an owner for the loss of property taken from him.[18] In unusual circumstances, this requires using the aggregate-of-interests formula to adequately reimburse an owner for the taking. In Boston Chamber of Commerce v. Boston, the United States Supreme Court rejected the undivided-fee rule precisely because it overlooks scenarios such as the instant case.[19] Apparently, the majority finds this unpersuasive.

As United States Supreme Court Justice Oliver Wendell Holmes stated, "[The Constitution] does not require a parcel of land to be valued as an unencumbered whole when it is not held as an unencumbered whole."[20] Perhaps more importantly, Justice Holmes stated that the Constitution "deals with persons, not with tracts of land. And the question is what has the owner lost, not what has the taker gained."[21] Finally, Justice Holmes points out that the Constitution "merely requires that an owner of property taken should be paid for what is taken from him."[22] In short, the Constitution mandates that a private property owner be placed in as good a position after a taking as if the property had not been taken.[23]

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[17]Oliver Wendell Holmes, Codes, and the Arrangement of the Law, 5 Am. L. Rev. 1 (1870), reprinted in 44 Harv. L. Rev. 725, 728 (1931).

[18]See Boston Chamber of Commerce v. Boston, 217 U.S. 189, 195 (1910); People v. Lynbar, Inc., 62 Cal. Rptr. 320, 327 (Ct. App. 1967); Iacometti, 79 Nev. at 128 n.10, 379 P.2d at 473 n.10; Virginia and Truckee R. R. Co., 8 Nev. at 171-72.

[19]Boston Chamber of Commerce, 217 U.S. at 195.

[20]Id.

[21]Id.

[22]Id.

[23]Lynbar, Inc., 62 Cal. Rptr. at 327.

California appellate courts, relying on identical statutes, have supported both methods of valuation.[24] The California Court of Appeal, in County of Los Angeles v. American Savings & Loan Ass'n, discusses a hypothetical identical to the instant case.[25] The court theorizes that when using the undivided-fee rule, the sum of all the individual interests will equal what the value of the property would be with only one interest,[26] but notes that the assumption is not always true. Under the aggregate-of-interests rule, however, "the condemnor pays to the owner of each individual interest its fair market value regardless of whether the total payment is more or less than the value of the fee if it had been owned by one person."[27]

The aggregate-of-interests rule is therefore sometimes criticized as "giving the condemnor a windfall."[28] For example, a windfall occurs when a developer purchases several separate parcels that, when combined, result in land worth far more than the sum paid for the individual parcels.[29] The court in American Savings & Loan Ass'n explains, "[T]his frequently happens in the open market."[30] I agree; however, in this case we are not dealing with an "open market" transaction. This is a taking, and just compensation should be paid to all the interested parties.

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[24]County of Los Angeles v. American Savings & Loan Ass'n, 102 Cal. Rptr. 439, 443 (Ct. App. 1972) (citing Mike Talley, Note, The Undivided Fee Rule in California, 20 Hastings L.J. 717, 721 (1969)).

[25]Id. at 442-43.

[26]Id. at 442.

[27]Id.

[28]Id. at 443.

[29]Id.

[30]Id.

While the fairness of either rule may be debated, the majority insinuates I ignore or mistakenly construe NRS 37.115. The majority contends the language of the statute effectively codifies the undivided-fee rule. I disagree with that interpretation.

NRS 37.115 states: "Where there are two or more estates or divided interests [in] property sought to be condemned, the plaintiff is entitled to have the amount of the award for such property first determined as between plaintiff and all defendants claiming any interest therein. The respective rights of such defendants in and to such award shall be determined by the court, jury, or master in a later and separate hearing in the same proceeding and the amount apportioned by order accordingly." This terminology is consistent with the idea of determining the interests of all parties, not just one. For example, the statute may be fairly applied for condemnation proceedings if there were two or more tenants in common who share fee ownership. The tenants in common would be entitled to divide the net proceeds based upon their fee ownership percentages. This is not the case, however, when there are separate estates such as leasehold interests or a life estate together with fee ownership. Thus, as in the American Savings & Loan Ass'n hypothetical, the aggregate value of the separate estates exceeds the fair market value of the fee interest valued by itself. Therefore, to withstand constitutional muster and award just compensation, the fee and leasehold estates must be appraised separately and their values aggregated. The interpretation of NRS 37.115 by the majority fails to provide for just compensation. I interpret NRS 37.115 to be a procedural rule.

Furthermore, the majority places much emphasis on the language of NRS 37.009(6), which states in part: "'Value' means the most probable price which a property would bring in a competitive and open market under the conditions of a fair sale." The statute continues, however, with the condition that "[t]he buyer and seller are typically motivated."[31]

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[31]NRS 37.009(6)(b).

"Typically motivated" sellers are not those whose land is taken away by eminent domain. We do not have before us a willing seller. It is difficult for me to envision a normal transaction in which the seller is forced to sell his or her interest in the land whether he or she likes it or not. This key distinction prevents a forced sale from being a "fair sale."[32]

The majority confuses valuation with allocation. Under NRS 37.115, the district court conducts two hearings. At the first hearing, valuation is determined. The undivided-fee rule or the aggregate-of-interests rule may be used to determine the value of the property. The district judge, or the jury, considers expert testimony and evidence as to the value of the condemned property. After valuation, the condemnor is excused from the second proceeding, as no issue remains regarding the amount to be paid for the property. At the second hearing, however, additional evidence is heard regarding how the funds should be allocated.

Apparently, the majority assumes whatever determination of value made during the first hearing binds the court to that allocation at the second hearing. I disagree with that reasoning. The first hearing is solely to determine value, regardless of the method of valuation. The second hearing exists to allow the court, or the jury, to consider evidence as to how the entire sum should be allocated. The aggregate-of-interests rule does not interfere with the second hearing. To the contrary, the rule ensures the amount to be allocated is sufficient to compensate all interests justly.

We must remain true to the fundamental principles of thcUnited States and Nevada Constitutions. "'[T]he law... must

---

[32]NRS 37.009(6).

jealously guard the rights of individual owners."[33] We should not forget John Locke's principle that "governments were instituted to protect every person's property against the depredations of his neighbor."[34] It is unjust to take an individual property owner's land and refuse to properly compensate him for his loss. Respectfully, I would affirm the decision of the district court and allow the aggregate-of-interests rule to determine just compensation when more than one estate is being condemned.

/s/ Gibbons, J.
Gibbons

I concur:

/s/ Shearing, J.
Shearing

---

[33]Iacometti, 79 Nev. at 128 n.10, 379 P.2d at 473 n.10 (quoting Virginia and Truckee R. R. Co., 8 Nev. at 171).

[34]Southwestern Ill. Development Auth. v. NCE, 710 N.E.2d 896, 901 (Ill. App. Ct. 1999) (citing William B. Stoebuck, A General Theory of Eminent Domain, 47 Wash. L. Rev. 553, 595 (1972) (discussing Locke's principles of eminent domain)).

IN THE SUPREME COURT OF
THE STATE OF NEVADA

COUNTY OF CLARK, A POLITICAL SUBDIVISION OF THE STATE OF NEVADA,
Appellant,
vs.
SUN STATE PROPERTIES, LTD., A NEVADA LIMITED PARTNERSHIP; AND RUTH PYLES, TRUSTEE OF THE CLARENCE AND RUTH PYLES TRUST,
Respondents.

No. 35856

[DATE STAMP]
FILED
AUG 29 2003
JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY /s/ J. Richards
CHIEF DEPUTY CLERK

ORDER DENYING REHEARING

Rehearing denied. NRAP 4O(c).
It is so ORDERED.[1]

/s/ Agosti, C.J.
Agosti

/s/ Shearing, J.
Shearing

/s/ Rose, J.
Rose

/s/ Becker, J.
Becker

/s/ Maupin, J.
Maupin

/s/ Gibbons, J.
Gibbons

cc: Eighth Judicial District Court Department 12, District Judge Hon. Michael L. Douglas, District Judge

[1]The Honorable Myron E. Leavitt, Justice, voluntarily recused himself from participation in the decision of this matter.

Clark County District Attorney David J. Roger/Civil Division
Carl E. Lovell Jr.
Mushkin & Hafer
Attorney General Brian Sandoval/Las Vegas
Clark County Clerk

IN THE SUPREME COURT OF
THE STATE OF NEVADA

COUNTY OF CLARK, A POLITICAL SUBDIVISION OF THE STATE OF NEVADA,
Appellant,
vs.
SUN STATE PROPERTIES, LTD., A NEVADA LIMITED PARTNERSHIP; AND RUTH PYLES, TRUSTEE OF THE CLARENCE AND RUTH PYLES TRUST,
Respondents.

No. 35856

District Court Case
No. A346912
A346912

[DATE STAMP]
FILED
OCT 02 2003
JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY /s/ J. Richards
CHIEF DEPUTY CLERK

REMITTITUR

TO: Shirley Parraguirre, Clark County Clerk
Pursuant to the rules of this court, enclosed are the following:

Certified copy of Judgment and Opinion/Order.
Receipt for Remittitur.

DATE: September 23,2003
Janette M. Bloom, Clerk of Court
By: /s/ J. Richards
Chief Deputy Clerk

cc: Hon. Michael L. Douglas, District Judge
Eighth Judicial District Court Department 12, District Judge
Attorney General Brian Sandoval/Las Vegas
Clark County District Attorney David J. Roger/Civil

Division
Mushkin & Hafer
Carl E. Lovell Jr.

RECEIPT FOR REMITTITUR

Received of Janette M. Bloom, Clerk of the Supreme Court of the State of Nevada, the REMITTITUR issued in the above-entitled cause, on 9-25-03.

/s/ Nometa Caldwell
Deputy County Clerk

[DATE STAMP]
RECEIVED
OCT 01 2003
JANETTE M. BLOOM
CLERK OF SUPREME COURT
DEPUTY CLERK

[DATE STAMP]
RECEIVED
SEP 25 2003
COUNTY CLERK

ORIGINAL

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SUN STATE PROPERTIES, LTD.

[DATE STAMP]
FILED
Mar 13 11 46 AM '00
Shirley Parraguirre
CLERK

DISTRICT COURT
CLARK COUNTY, NEVADA

COUNTY OF CLARK, a political subdivision of the State of Nevada,
Plaintiff,

Case no. A346912
Department XII

vs.

SUN STATE PROPERTIES, LTD., a Nevada Limited Partnership; CLARENCE PYLES and RUTH PYLES, Trustees of the Clarence and Ruth Pyles Trust, et al.,
Defendants.

Hearing Date: 11/30/99
Hearing Time: 9:00 AM

[DATE STAMP]
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COUNTY CLERK

JUDGMENT

This action having come before the Court for trial to the Court sitting without a jury, and the Court having heard the arguments of counsel, having reviewed the entire file and

pleadings herein as well as the exhibits entered into evidence, having considered the briefs filed at the conclusion of the trial, and having entered its separate Findings of Fact and Conclusions of Law, now enters its Judgment in accordance with its findings, and good cause appearing therefor,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the Defendants are awarded Judgment in the total amount of $3,634,000.00 as and for the value of the Defendants' interests in the real estate taken by Clark County, plus interest on the total award at the statutory rate from the date of valuation, i.e. June 22, 1999, until the Judgment is satisfied; and

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the Court apportions the award between the Defendants as follows:

A. Damages are awarded to Sun State Properties in the amount of $462,000.00 as and for the leasehold value from the date of the order of possession, i.e. July 14, 1995, until the date of valuation, i.e. June 22, 1999;

B. The amount of $1,868,000.00 is awarded to Sun State properties for the interest of Sun State Properties in the fee and the leasehold possessed by said Defendant;

C. Damages are awarded to the Clarence and Ruth Pyles Trust in the amount of $24,000.00 as and for the period of time from the date of the order of possession, i.e. July 14, 1995, until the date of valuation, i.e. June 22, 1999; and

D. The amount of $1,030,000.00 is awarded to the Clarence and Ruth Pyles Trust for the fee interest of said Defendant in the subject real estate.

Dated: March 10, 2000

/s/ James C. Mahan
DISTRICT COURT JUDGE

Submitted by:
MUSHKIN & HAFER

By /s/ Michael R. Mushkin
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[DATE STAMP]
FILED
Mar 15 11 38 AM '00
Shirley Parraguirre
CLERK

DISTRICT COURT
CLARK COUNTY, NEVADA

COUNTY OF CLARK, a political subdivision of the State of Nevada,
Plaintiff,

vs.

SUN STATE PROPERTIES, LTD., a Nevada Limited Partnership; CLARENCE PYLES and RUTH PYLES, Trustees of the Clarence and Ruth Pyles Trust, et al.,
Defendants.

Case no. A346912
Department XII

Hearing Date: 11/30/99
Hearing Time: 9:00 AM

[DATE STAMP]
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MAR 15 2000
COUNTY CLERK

NOTICE OF ENTRY OF JUDGMENT

PLEASE TAKE NOTICE that a Judgment was entered on March 13, 2000 in the above-captioned matter. A copy of said Judgment is attached hereto.

DATED March 14, 2000.

MUSHKIN & HAFER

By /s/ Michael R. Mushkin
MICHAEL R. MUSHKIN, ESQ.
Nevada State Bar #2421
930 South Third Street, #300
Las Vegas, Nevada 89101
Attorneys for Defendant
SUN STATE PROPERTIES, LTD.

CERTIFICATE OF MAILING

I hereby certify that I served the foregoing Notice of Entry of Judgment with Judgment attached thereto , along with Findings of Fact and Conclusions of Law, in the above-captioned matter, by placing true and correct copies in a sealed envelope, with first class postage prepaid thereon, and depositing same in the United States Mail at Las Vegas, Nevada, addressed to:

CARL E . LOVELL, JR., ESQ .
2801 S. Valley View, #1-B
Las Vegas, NV 89102

Attorney for Defendants PYLES

MICHAEL L. FOLEY, DEPUTY DISTRICT ATTORNEY
STEWART L. BELL, DISTRICT ATTORNEY
500 South Grand Central Parkway, Fifth Floor
P O Box 552215
Las Vegas, NV 89155

Attorneys for Plaintiff, County of Clark on March 14, 2000

/s/ [illegible]
an employee of MUSHKIN & HAFER

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[DATE STAMP]
FILED
Mar 13 11 45 AM '00
Shirley Parraguirre
CLERK

DISTRICT COURT
CLARK COUNTY, NEVADA

COUNTY OF CLARK, a political subdivision of the State of Nevada,

Plaintiff,

vs.

SUN STATE PROPERTIES, LTD., a Nevada Limited Partnership; CLARENCE PYLES and RUTH PYLES, Trustees of the Clarence and Ruth Pyles Trust, et al.,

Defendants.

Case no. A346912
Department XII

Hearing Date: 11/30/99
Hearing Time: 9:00 AM

[DATE STAMP]
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FINDINGS OF FACT
AND CONCLUSIONS OF LAW

This Court having convened the regularly scheduled

non-jury trial in the above-captioned matter on the 30th day of November, 1999, Michael L. Foley, Deputy District Attorney, appearing for the Plaintiff; Michael R. Mushkin, Esq. appearing for Defendant, Sun State Properties, Ltd.; Carl E. Lovell, Jr., Esq. appearing for Defendants, Clarence Pyles and Ruth Pyles, Trustees of the Clarence and Ruth Pyles Trust. The Court heard the arguments of counsel at the time of trial, and thereafter requested that the parties file simultaneous briefs; and on January 11, 2000 at 9:00 a.m., the parties returned for closing arguments. At the conclusion of closing arguments, the court having taken the matter under advisement; and, thereafter, the court having reviewed the entire file and pleadings herein as well as the briefs filed at the conclusion of the trial, the Court now makes its Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

1. Any Finding of Fact set forth herein which should more properly be set forth as a Conclusion of Law shall be deemed a Conclusion of Law.

2. The Court finds that this is an action in eminent domain, by which the County of Clark is seeking to condemn certain real property in downtown Las Vegas. The Defendants Pyles are the owners of a portion of the real property taken, and the Defendant Sun State Properties is the owner of a portion of the real property taken. Sun State Property is the successor lessee on a fifty-five-year lease that was executed in 1963, thereby creating a leasehold on the Defendants Pyles condemned property.

3. The County, having claimed that the Undivided Fee Rule which is embodied in NRS 37.115 should apply herein, produced evidence only of the value of the fee simple interest in the real property.

4. The Defendants urged that the Court is required to value the aggregate of their respective interests in the real property in the first phase or first hearing and that, pursuant to NRS 37.115, their separate interests should then be apportioned in a second hearing.

5. The Court finds that there are no cases on point in Nevada construing NRS 37.115. However, the Nevada statute is substantially identical to the statute under consideration (CCP 1246.1) in *People v. Lynbar, Inc.*, 253 Cal. App. 2d 870, 62 Cal. Rptr. 320 (1967). See Decision of Court, filed on January 31, 2000.

6. The Court finds that there are constitutional guarantees involved. Both the Nevada Constitution and the United States Constitution require that one with an interest in property receive just compensation in condemnation proceedings. The position urged by the County here has the effect of denying that just compensation to the defendants. In recognizing those constitutional guarantees, the court in *Lynbar* held as follows:

> The property owner must be made whole for his loss and be recompensed in an amount of money equal to that loss. In short, just compensation is based on the loss the owner suffers rather than the benefit which the taker receives. What is to be valued for that purpose is what the involuntary sellers have to sell rather than what the public buyer seeks to acquire. *Ibid.*, Cal. App. at 880, Cal. Rptr. at 328 (Citations omitted.)

7. Under NRS 37.115, the parties in the first phase of the trial testify as to the value of their interests in the subject improved real property as well as the enhancement value that a particular interest adds to the total value for the entirety. In the second phase, the total award is to be apportioned among the various holders of interests by the same fact finder, either judge or jury.

8. The County conceded that its valuation of the fee simple value of the condemned property was not very different from that advanced by the defendants – approximately $2,000,000.00. The real disagreement between the two sides concerns the valuation of the Sun State leasehold interest: the County did not value this interest at all, while the defendants produced evidence of its valuation.

9. Since the Court finds that the Sun State leasehold interest is a compensable interest, it is constrained to accept the defendants' valuation, which was not contradicted by any evidence produced by the plaintiff County. Accordingly, the Court finds that the value of all of defendants' interests in the subject real property is $3,634,000.00.

10. On February 9, 2000 at 9:00 a.m., the Court reconvened for the apportionment phase of this case pursuant to NRS 37.115, and additional evidence was presented concerning the valuation of the defendants' separate interests. Accordingly, the Court finds that severance damages in the amount of $250,000.00 are due to Sun State Properties.

11. The Court finds that damages are due to Sun State Properties in the amount of $462,000.00 as and for the leasehold value from the date of the order of possession, i.e. July 14, 1995, until the date of valuation, i.e. June 22, 1999.

12. The Court finds damages are due to the Clarence and Ruth Pyles Trust in the amount of $24,000.00 as and for the period of time from the date of the order of possession, i.e. July 14, 1995, until the date of valuation, i.e. June 22, 1999.

13. The Court finds that $1,030,000.00 is just compensation for the fee interest of the Pyles Trust.

14. The Court finds $1,868,000.00 is just compensation for the interest of Sun State Properties in the fee and the

leasehold possessed by said defendant.

CONCLUSIONS OF LAW

1. The Nevada Constitution in Article I §8, requires that private property must not be taken for public use without payment of just compensation. NRS 37.110 requires the judge or jury in a condemnation case to ascertain and assess the value of the condemned property. *State ex rel. Department of Highways v. Shaddock*, 75 Nev. 392, at 398, 344 P.2d 191 (1959).

2. NRS 37.110, which is entitled "Ascertainment and Assessment of Damages" provides in pertinent part as follows:

> The court, jury, commissioners or master must hear such legal testimony as may be offered by any of the parties to the proceedings, and thereupon must ascertain and assess:
> 1. The value of the property sought to be condemned, and all improvements thereon pertaining to the realty, and of each and every separate estate and interest therein; if it consists of different parcels, the value of each estate or interest therein shall be separately assessed." (Emphasis added.)

This statute reveals the intent of the Nevada Legislature to ensure that each claimant be given the right to separate assessment of the value of his estate of interest. Expert witnesses for each defendant should be allowed from the outset to present evidence that relates to that individual interest in the subject real property. This statute is strong authority that the undivided fee rule was not intended to be, and in fact is not, the law in Nevada. The County relies upon a different statute, NRS 37.115, as authority for its position that Nevada law requires the application of the undivided fee rule so that the fair market value of the fee simple value is determined in an initial hearing.

The defendants then must present evidence of their separate interests in a second proceeding. It is important to note that under the county's scenario, the condemning authority would not pay the claimants the value of their interests. Rather, the county would pay only the fee simple value of the condemned property. If the total value of the separate interests of the defendants exceeded that sum, then one or both of them must necessarily receive less than fair market value of their interest.

3. NRS 37.115 provides for a bifurcated hearing at the request of the condemnor. The total value is determined in the first proceeding and the apportionment among the defendants in the second proceeding as follows:

> Where there are two or more estates or divided interests in property sought to be condemned, the plaintiff is entitled to have the amount of the award for such property first determined as between plaintiff and all defendants claiming any interest therein. The respective rights of such defendants in and to such award shall be determined by the court, jury, or master in a later and separate hearing in the same proceeding and the amount apportioned by order accordingly.

The foregoing language does not mandate or even suggest use of the "undivided fee rule" but, in fact, allows for considerable judicial latitude in methods and procedures by which the jury may determine the award amount. Also, the statute does not even hint that expert witnesses should be restricted only to evidence of the value of the entire fee being condemned.

4. In the present case the two defendants each hold an interest in improved real property. The Court must take that diversity of interests into account and must award each of the defendants just compensation. The undivided fee rule will not operate to the ends of justice here. The Nevada statutes do not require or even suggest that the old undivided fee rule is to be

used by Nevada district courts. If any inference is left by the wording of the statutes, it is that this rule is not the law. Nevada law allows for just compensation of all compensable interests and to that end provides that where separate estates are involved, each estate shall be separately assessed. This "separate assessment" allows each claimant to put on evidence as to his claim for consideration by the jury, which procedure is the most simple, straightforward and least confusing.

5. Accordingly, the total value of the defendants' interests in the subject real property is $3,634,000.00, and the Court apportions the award as follows:

A. Damages are awarded to Sun State Properties in the amount of $462,000.00 as and for the leasehold value from the date of the order of possession, i.e. July 14, 1995, until the date of valuation, i.e. June 22, 1999.

B. Damages are awarded to the Clarence and Ruth Pyles Trust in the amount of $24,000.00 as and for the period of time from the date of the order of possession, i.e. July 14, 1995, until the date of valuation, i.e. June 22, 1999.

C. An award of $1,030,000.00 is just compensation for the fee interest of the Pyles Trust.

D. An award of $1,868,000.00 is just compensation for the interest of Sun State Properties in the fee and the leasehold possessed by said defendant.

Let judgment be entered accordingly.

Dated: March 10, 2000

/s/ James C. Mahan
DISTRICT COURT JUDGE

Submitted by:
MUSHKIN & HAFER

By /s/ Michael R. Mushkin
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Supreme Court, U.S.
FILED
JAN 2 1 2004
OFFICE OF THE CLERK

No. 03-580

In the Supreme Court of the United States

RUTH PYLES, TRUSTEE OF THE CLARENCE AND RUTH PYLES TRUST
Petitioners,

v.

COUNTY OF CLARK, A POLITICAL SUBDIVISION OF THE STATE OF NEVADA
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Nevada

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

The first question to be determined is whether the opinion by the Nevada Supreme Court is sufficiently final for the exercise of this court's jurisdiction. If the court finds there is jurisdiction, the question would be whether the Undivided Fee Rule is in violation of the Fifth Amendment to the United States Constitution which requires the awarding of just compensation in eminent domain cases.

PARTIES TO THE PROCEEDINGS

The Petitioner in this case is a family trust which owns real estate in Las Vegas, Nevada. The Respondent, County of Clark, is a county and political subdivision in the State of Nevada which filed a complaint in eminent domain to condemn real estate owned by the Petitioners for expansion of jail capacity in Las Vegas, Nevada.

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28 U.S.C. 1257 1

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondent respectfully requests that this Court deny the petition seeking review of the opinion issued by the Nevada Supreme Court in this case.

♦

OPINIONS BELOW

The opinion of the Nevada Supreme Court was issued July 21, 2003. Rehearing was denied August 29, 2003. The case is reported at 72 P.3d 954. The trial court opinion is unreported.

♦

STATEMENT OF JURISDICTION

The Petitioners claim jurisdiction under 28 U.S.C. 1257 (a). However, the Nevada Supreme Court remanded the case to the state trial court for further proceedings. As is more fully set forth in the reasons for denying the petition section of this brief, the state court decision lacks the finality required by this court to grant a writ of certiorari. Cox Broadcasting v. Cohn, 420 U.S. 469, 95 S.Ct. 1029 (1975), North Dakota State Board of Pharmacy v. Snyder's Drug Stores, 414 U.S. 156, 94 S.Ct. 407 (1973). Under this court's previous rulings, a decision by a state Supreme Court on an eminent domain case is only final when the state court has issued a judgment that is final on both the question of the taking and also on the amount of compensation. In our case, the landowners recently filed a motion with the state trial court for a jury trial on the issue of damages. The state court

recently granted that motion. The jury trial will probably not take place for several months.

♦

STATEMENT OF CASE

The County filed a complaint in condemnation to acquire two parcels of land in downtown Las Vegas to build a jail facility. The Complaint named as defendants, Sun State Properties, which owns one of the parcels being taken and, under a long-term ground lease, possesses and operates the apartments located on the second parcel. The County also named the Pyles Trust which owns the second parcel which was leased to Sun State Properties. Also named as defendants were several lenders who had deeds of trust or mortgages on the property. In July 1995, the District Court awarded occupancy of the property to the County and the County posted a cash bond with the Court. The cash bond was withdrawn by the defendants, the lenders were paid from the bond money and were released from the case. In November 1999, the State District Court held a two-day bench trial. Prior to the trial, the County filed a motion regarding NRS 37.115 asking the Court to value the property taken using the "undivided fee" rule whereby the property would be valued under the statutory definitions of fair market value and then, in a second proceeding, have the Court determine which portion of the compensation would be received by the landlords and how much would be received by the tenant. The Court deferred its decision on the motion until the trial. The Court took the matter under submission and later entered its decision. The Court decided not to use the undivided fee rule and valued all of the interests of the parties separately. On the parcel which is owned by the Pyles Trust and leased by Sun state Properties, the Court decided to give the lessee

the full value of its leasehold interest because the lease that encumbered the Pyles property provided for rent that was well below market rent and therefore had bonus value for the tenant. However, the Court also awarded the full value of the property to the owners of the property as if the land were not encumbered by the below market lease. The County appealed the Court's decision in this case to the Nevada Supreme Court. The Nevada Supreme Court reversed the trial court. The court ruled that the eminent domain rule known as the Undivided Fee Rule was adopted by the legislature by statute, NRS 37.115. The State Supreme Court also ruled that a property owner in a condemnation case may collect lost profits that would have been earned on the property following the filing of the eminent domain complaint if the property owner can show that the government caused an unreasonable delay in bringing the action to trial if the government purposely and in bad faith pursued an unconscionable dilatory course of action during litigation. It is unlikely that the property owners could show such conduct since none existed but that issue will have to be determined by the trial court also. As a result, the present posture of the case is that the parties must litigate in State District Court the issues of what compensation is due to the owner for the taking of the property and whether the property owners are entitled to receive additional compensation for loss of profits during the condemnation case.

REASONS FOR DENYING THE PETITION

1. The State Court judgment in this case is not final and therefore this court lacks jurisdiction to grant the petition.

The Petitioners in this case, Ruth Pyles and the Ruth Pyles Trust are the owners of one of the parcels of land taken in this case. The parcel was encumbered by a long term lease which had approximately eighteen (18) years remaining on it at the time of the taking. They leased the property approximately twenty (20) years earlier. The lessee of the property built apartment houses on the land. However, the lease was strictly a ground lease and the Petitioners were entitled to receive only five hundred dollars per month rent on the entire property for the remainder of the lease. There were no clauses for rent escalations or cost of living increases. The four appraisers who appraised the Petitioner's property gave expert opinions that the fair market value of the property was worth between $984,000.00 and 1,148,000.00. The two appraisers who valued the lessee's interest and the owner's reversion interest as they existed at the time of taking valued the Petitioner's remainder ownership interest in the parcel at $251,000.00 to $263,000.00. One of the appraisers hired by the Petitioners did not value the individual interest as they existed. Instead, he gave his opinion as to the full market value of the property which he pegged at $1,030,000.00. He then came up with the opinion that since the condemnation extinguishes the lease, the Petitioners should not be compensated for their interest in the land as it existed at the time of the taking but should rather receive the full market value of the property as if not encumbered by the bad lease.

The trial court decided to value the interest of the lessee as if there were eighteen years left on the lease but when awarding compensation to the property owner, decided to value the owner's interest as if no lease existed. As a result, a property that was worth at the most $1,148,000.00 resulted in the County paying over $2,000,000.00 since the lessee would receive the full value of its leasehold interest and the owners received full market value of the property as if there were no leasehold interest. Upon realizing this, the Nevada Supreme Court stated:

> Thus, the District Court's just compensation resulted in an award more than what Sun State and the Pyles lost. 72 P.3d 954, 960.

The Nevada court cited this court's opinion in Boston Chamber of Commerce v. Boston, 217 U.S. 189, 195, 30 S.Ct. 459 (1910). Noting that this court ruled that the compensation paid for condemned property should place the property owner in as good a position as he was before the taking.

The Nevada Supreme Court went on to reverse the district court decision and remanded the case for a new trial.

Under a Nevada statute, NRS 37.160, the title to Petitioner's property will not vest in the County until a final order of condemnation is issued by the court and is recorded with the County Recorder. The final order of condemnation will not be issued by the court until the matter of compensation is finally determined. As a result, there is no final judgment awarding title to the property to the County nor is there a final judgment determining what amount of compensation will eventually be awarded to the Petitioners. This court has ruled that a petition for certiorari cannot be

granted unless the state court decision is final as to the federal questions involved. The court has also ruled that in eminent domain proceedings, a state court judgment is not final unless the state court action has embraced not only a final judgment regarding the taking of the land but also the amount of compensation that is awarded to the property owner as a result of losing his title to the property.

In the case of Cox Broadcasting Corporation v. Cohn, 420 U.S. 469, 95 S.Ct. 1029 (1975), this court stated:

> Eminent domain proceedings are of the type that may involve an interlocutory decision as to a federal question with another federal question to be decided later. For in those cases the federal constitutional question embraces not only a taking but a taking on payment of just compensation. A state judgment is not final unless it covers both aspects of that integral problem. (Citing North Dakota State Board of Pharmacy v. Snyder's Drug Stores, Inc., 414 U.S. 156, 163, 94 S.Ct. 407, 412). 420 U.S. 469, 477, 95 S.Ct. 1029, 1037, footnote 6.

In our case, we do not have a final order of condemnation that would finally vest the title in the County nor do we have a final order regarding the amount of just compensation to be paid for the taking. As a result, this does not fit into the four categories discussed in Cox Broadcasting which would allow this court to hear a case that is not final. Since this case lacks sufficient finality under this court's previous rulings, the Petition for Certiorari should be denied.

2. The Undivided Fee Rule does not violate any federal constitutional provision.

Most of the eminent domain provisions in Nevada are set forth in Chapter 37 of the Nevada Revised Statutes. NRS 37.115 provides:

> where there are two or more estates or divided interests in property sought to be condemned, the plaintiff is entitled to have the amount of the award for such property first determined as between plaintiff and all defendants claiming any interest therein. The respective rights of such defendants in and to such award shall be determined by the court, jury, or master in a later and separate hearing in the same proceeding and the amount apportioned by order accordingly.

The Nevada Supreme Court held that this statute is a codification of the undivided fee rule. The basic concept of the undivided fee rule is that when a government takes property that is subject to a lease or mortgage or other encumbrance, the property is first valued as if owned and occupied by the same person. When the fair market value is ascertained, that is the amount that the government has to pay. Then in a separate proceeding, the landlord, tenant and mortgagee are allowed to present evidence to determine what the values of their individual interests in the property are and the Court distributes the compensation to the parties according to the value of each interest.

In the case of The City of Manhattan v. Kent, 618 P.2d 1180 (Kan. 1980), the Kansas Supreme Court held that evidence of the value of a lease should be excluded during the initial valuation stage of the proceedings. The court should

first determine the fair market value of the entire property. The lessee and lessor could then put on evidence of the value of their individual interests during the apportionment stage of the proceedings. The Kansas Court went on to state that the rental payments from the lease could be considered during the initial valuation stage along with any other evidence that might indicate what a buyer would pay for the property. However, the value of the lessee's or lessor's interest in the property would not be admissible in the initial valuation stage of the proceedings. Allowing the rental payments to be considered during the valuation stage of the proceedings is in accord with the decision of the Nevada Supreme Court in State v. Shadduck, 75 Nev. 392 (1959), where the Nevada Supreme Court stated that evidence of rental payments could be admitted when determining the value of the property.

In the case of Urban Renewal Agency v. Wieder's Inc., 632 P.2d 1334 (Ore. App. 1981) cert. denied 644 P.2d 1127 (Ore. 1981), the Court ruled that the lessee could not put on evidence of the value of its leasehold interest during the valuation stage of the trial because the main issue at that stage is the fair market value of the property being taken. As in Nevada, the Court ruled that evidence of the existence of a lease is admissible during the valuation stage to show such things as the highest and best use of the property. However, the lease value to the lessee or lessor is not relevant at this stage of the proceedings and the Court ruled that the lease value should only be determined at the apportionment stage of the proceedings. 632 P.2d 1334, 1336.

Likewise, in the case of Montgomery Wards v. City of Sterling, 523 P.2d 465 (Colo. 1974), the court ruled that a lessee cannot put on evidence of the value of his leasehold interest during the valuation stage of the trial because the main issue at that stage of the trial is the fair market value of

the property. As in Nevada, the court ruled that the evidence of the existence of the lease or its income stream is admissible during the valuation stage but the value of the lessee's interest in the lease or the value of the landlord's reversion interest is not relevant at the first stage of the proceedings. Those values should only be determined at the second apportionment stage following the trial.

In ruling against the County in our case on this issue, the trial Court cited at length the case of People v. Lynbar Inc., (1967) 253 Cal. App. 2d 870, 62 Cal. Rptr. 320. The Court's reliance on this case was surprising because neither party cited the Lynbar case in any of its moving papers or briefs. The reason the County did not cite it was that later California cases have all explained away the language in the Lynbar case.

The District Judge cited Lynbar as allowing a separate valuation for each interest in the property instead of first ascertaining the fair market value of the property as a whole. However, that was not the holding in the Lynbar case. What the Lynbar case ruled was that evidence of the lease income was admissible to help determine what a buyer would pay for the property. The Court still had to determine the fair market value of the property as a whole. The discussion about valuing different interests was dicta since the tenant was not claiming a share of the award. All the Lynbar case ruled was that the existence of a beneficial lease was something that a buyer might consider when determining what to pay for the property. If the rental payments were above rents paid in the market, a buyer would likely pay a higher price for the property. If the lease payments were below market rents in the area, then the buyer would likely pay a lower price for the property. This holding is just like the holding in the case of State v. Shadduck, 75 Nev. 392 (1959) in which the Nevada

Court ruled that rental payments that are generated by the property should be admitted when trying to determine the fair market value of the property. 75 Nev. 392, 398. The Court in Shadduck ruled that when determining fair market value, a jury could consider any elements that an ordinary, prudent business person would consider when deciding what to pay for the property. However, the jury would still then have to reach the bottom line determination as to what the fair market value of the property is.

The District Court's finding in this case that the Lynbar case held that the leasehold interest should be valued separately during the first phase of the trial is not accepted by the California courts. The District Court in our case cited the California case of County of Los Angeles v. American Savings And Loan, 26 Cal. App.3d 7, 102 Cal. Rptr. 439 for the proposition that the Lynbar case acknowledges that a separate valuation of all of the interests can result in the total award being worth more than the fair market value of the property. However, in the American Savings and Loan case, the Court discussed the holding in Lynbar and the landlord's contention that the court should ignore the fact that Los Angeles County already had a long-term lease on the property. The Court stated:

> It is equally ridiculous to suppose that a buyer in the open market in light of the existence of the County's unexpired lease, would have paid American the same amount as the property would have brought if unencumbered by the lease. . . 102 Cal. Rptr. 439, 443; 26 Cal. App. 7, 12.

Therefore, even under the Lynbar reasoning, the Court should have recognized that a long-term lease encumbering the property would lower the value of the landlord's interest

in the property. The lease in the American Savings and Loan case only had about 8 years left to run. The lease in our case had over 18 years left to run which would magnify the lowering of value of the landlord's interest to potential purchasers. In that County of Los Angeles v. American Savings and Loan case, the Second Court of Appeals which was the court that previously decided Lynbar also stated:

> California statutes, as well as court decisions, appear to support both the undivided fee and the aggregate of interest rules. . . 102 Cal. Rptr. 439, 433; 26 Cal. App. 3d 7, 12.

Later California cases have explained the Lynbar holding for what it was. It simply held, as the Nevada court did in State v. Shadduck, that in the valuation stage, existing leases must be considered when determining what the value of the property is. In the case of People v. Amsden Court, 109 Cal. Rptr. 1; 33 Cal. App. 3d 83 (1973), the Court stated:

> . . . Lynbar simply holds that at the valuation stage, all existing leases must be considered as the condemnor must take the property in the condition in which it finds the property on the applicable date. . . 109 Cal. Rptr. 1, 4; 33 Cal. App. 3d 83, 88. (Emphasis added)

The Court in the Amsden case then went on to hold that the existence of a sublease in that case was properly admitted by the trial court during the valuation stage but the actual bonus value of the lease was to be determined at the separate apportionment stage of the trial. The Court stated:

> the trial court's ruling here was correct in any event as under Lynbar, for purposes of valuation, the price

> paid for the property is established by the existing lease. The existence of the sublease and the presence of any bonus value is left to the apportionment proceeding. . . 109 Cal. Rptr. 1, 5; 33 Cal. App. 3d 83, 89.

In our case, the County is not asserting that the Court cannot consider income from a lease during the value stage of the proceeding. In fact, the appraiser for the County looked at income of the property when doing research to determine the value of the property. Under Nevada law, the Court should allow any evidence that a reasonable prudent business person would consider when deciding what to pay for the property in question. This would include evidence of an advantageous lease or a disadvantageous lease on the property along with any other information that would be available to a buyer when determining what to pay for the property if it were put on the open market. State v. Shadduck, 75 Nev. 392 (1959); Tacchino v. State, 89 Nev. 150 (1973). These cases ruled that evidence is admissible if a reasonable business person would consider it when deciding what to pay for the property as a whole. However, the District Court still should follow the undivided fee rule, NRS 37.115, and first determine the value of the property as a whole and then, in a separate proceeding, determine what portion each interest holder receives from the award.

In the case of Costa Mesa v. Security National Bank, 62 Cal. Rptr. 113; 254 Cal. App. 2d 4 (1967), which was decided one week after the Lynbar case, the California Court held that the courts should value the property taken as if it were owned by a single person and then, in a later proceeding, apportion the award among the various interest holders. This is a statement of the classic undivided fee rule which might explain the court's statement in County of Los

Angeles v. American Savings and Loan, supra, when it noted that the California Courts supported both the undivided fee rule and the aggregate of interest rule. In more recent cases, the California courts have sorted out this jargon and have ruled that no matter what you call the California rule, the separate awards to the landlord and the tenant should still equal the fair market value of the property as a whole. In the case of New Haven School District v. Taco Bell, 30 Cal. Rptr. 2d 469; 24 Cal. App. 4th 1473 (1994), the California Court explained the current state of law in California as:

> whether or not the lessor and lessee are joined in a single proceeding, these rules will ordinarily result in an aggregate award to both lessor and lessee equal to the market value of the property. Where the lease rental falls below market value, the lessor will have a claim to less than the full market value of the property, since he is restricted to the present value of the actual contract rental; but the lessee will have the right to recover the balance of the market value, above that recovered by the lessor, as lease bonus value. . . 30 Cal. Rptr. 2d 469, 471-472.

Modern case law has held that the undivided fee rule should still be used when valuing divided fees in condemnation cases. The condemning authority should be required to pay the full fair market value of the property that it would bring if it were placed for sale on the open market. This valuation stage should include any good or bad features of the property including advantageous or disadvantageous leases, condition of buildings, existence of contamination and anything else a prudent buyer would consider when determining what to pay for the property. However, after paying the award for the value of the property, the government should have no further interest in how that award

is divided among the various interest holders. That portion of the litigation should be left to the owners, lessees, mortgagees, lienholders, etc. In the case of Gifford v. Colorado Springs, 815 P.2d 1008 (Colo. App. 1991) the owner of a restaurant sued the City claiming inverse condemnation because of the condemnation and construction of a roadway project which took part of a shopping center where the restaurant was located. The owner of the shopping center had already settled with the City so the tenant asked the Court to value its leasehold interest separately and grant an award for its leasehold separately from the award given to the owners. The Court stated:

> Under Colorado's undivided basis rule of fair market valuation, the condemnor must value the property as a whole by assuming ownership by one person while taking into consideration the value of encumbrances upon the fair market valuation of the property. . . when the value of the leasehold is considered in determining the reasonable market value of the property, a lessee is not entitled to establish the value of its leasehold interest independently of the value of the entire property, nor is he entitled to receive a separate award from the condemning authority for the value of the leasehold. . . once a fair market valuation has been established, the right to compensation is personal to the owner. . . and the apportionment of this amount among persons claiming a share is not a concern of the condemnor. . . 815 P.2d 1009, 1011.

Apparently the state of Georgia also had language in a case that caused the same confusion that Lynbar did in California. Some appellants cited the case of State Highway Department v. Thomas, 154 S.E.2d 812 (Ga. App. 1967) and

Bowers v. Fulton County, 146 S.E.2d 884 (Ga. 1966) for the proposition that Georgia law required a court to value all interests separately rather than following the undivided fee rule. However, the Georgia Supreme Court straightened out the confusion and simply held that this was not true. In the case of Fulton County v. Funk, 463 S.E.2d 883; 266 Ga. 64 (1995) the Georgia Supreme Court stated:

> Although Bowers expanded the elements of recoverable just and adequate compensation, it had no effect on the applicability of the "undivided fee rule". That rule applies only when the fair market value of a real property taken does, in fact, constitute just and adequate compensation in a particular case. Pursuant to the rule, the condemnor need only pay the value of the land that was taken, which is then to be divided among the claimants based upon their respective interests. . . Insofar as the valuation of the land taken is concerned, neither the lessor nor the lessee is harmed by the application of this rule in the usual case. Generally, a leasehold has value to the lessee only if he is paying below market rent and, to the extent that a fee is encumbered by a lease for below market rent, it is of a correspondingly lesser value to the lessor. . . Thus a single valuation of the undivided fee will represent the total amount of just and adequate compensation that must be paid for the real property taken and the lessee and lessor will be entitled to their respective shares thereof. Since the lessor owned and held the land subject to the interest therein of his lessee, he is not entitled to compensation for injury to the interest of the lessee. . . In that regard, the compensation to be paid is for the land that was taken and not for the different interests therein. Therefore, the duty of the condemnor to make payment is not

> affected by the nature of title or the diversity of interest in the property. Pursuant to this concept, known as the undivided fee rule, the condemnor need only pay the value of the land that was taken and this is divided among the claimants based upon their respective interests. . . there is no doubt in Georgia, each condemnee must be paid for what he has lost, not for what the condemnor has gained. However, in White, 444 S.E.2d 734, we mistakenly held that the undivided fee rule expresses a contrary principal. Rather than expressing a contrary principal, that rule merely insured that each condemnee will not be paid more than he has lost. Justice is no more done in the case of overpayment than in the case of underpayment. . . Under the rule, the fair market value of the property that was taken is generally the maximum amount that the condemnees can recover for their lost interests in the real property. This is true because when the value of the real property is being determined any "value" in the leasehold generally results in a corresponding loss in the "value" of the fee. The only exception is when the condemnees successfully assert that the property that was taken has a unique value ... 463 S.E.2d 883, 885; 266 Ga. 64, 65-66 (1995)

The property being taken in our case was not "unique." The Georgia courts define unique as a property that does not have a market value because such a property can not be bought or sold on the open market such as a railroad track. Chouinard v. City of Eastpoint, 514 S.E. 2d 220, 223; 237 Ga. App. 266, 268 (1999).

When asked to give an opinion of fair market value, the appraisers in our case were fairly close in their opinion of

what the total market value of the Pyle's property was worth. John Kiehlbauch valued the Pyle's parcel at $984,000. Mr. Rothenberg appraised the total market value of the Pyle's property at $1,030,000. Vern Cox valued the Pyle's property at a total of $1,050,000. Shelli Lowe appraised the Pyle's property at a total value of $1,148,000. By doing some quick math, it is plain to see that the County had to greatly overpay for the acquisition of the Pyle's property. The trial Court awarded Sunstate Properties a total of $1,868,000 for its interest in both the property it owned in fee and its leasehold interest in the Pyle's property. (72 P.3d 954, 956). Even if the trial Court gave the highest value given by the appraisers for the property that Sunstate owned in fee ($752,000 estimate by Shelli Lowe), then that means that Sunstate Properties was awarded $1,116,000 for its leasehold interest in the Pyle's property. Since the Court awarded $1,030,000 to the Pyles for its ownership interest in the property and $1,116,000 to the lessee for its leasehold interest in the Pyle's property, this means that the County paid over $2,000,000 for the Pyle's property which all of the appraisers agreed was worth between $984,000 and $1,148,000. The trial Court should have taken the fair market value of the property and subtracted from it the leasehold value of the lessee and given the rest to the lessor. Instead, the Court awarded a separate amount to the lessee for the lessee's interest and then valued the lessor's interest as if it were not encumbered by the lease. By stacking the individual interests of the lessors and lessees and not accounting for the simple fact that when a lessee has a long-term lease at a very low rent, his gain is the landlord's loss, the Court effectively doubled what the County had to pay for the property. If a lessee's interest in the property is worth over a million dollars because of an advantageous lease he has over the landlord, then the landlord's interest in the land would be so encumbered by that lease that the landlord's interest would be worth less than if he owned the property

free and clear. That is the whole basis of the undivided fee rule. It reflects what happens in the market in real life. Prospective buyers will not pay double for a property simply because there is a tenant involved. The Nevada Supreme Court was correct when it reversed the trial Court.

As was noted by the Nevada Supreme Court in its opinion in this case, the majority of the states apply the undivided fee rule. 72 P.3d 954, 958. There are reported cases from well over a century ago where courts have applied the undivided fee rule. In the case of Benjamin Edmands v. City of Boston, 108 Mass. 535, 1871 W.L. 8864 (1871), the Supreme Court of Massachusetts dealt with a Massachusetts statute that required the assessment of damages as if the owner were the only person interested in the land, and then, in a separate apportionment proceeding, decide what portion of the award each tenant and owner would receive. The court held that the Massachusetts statute which appears to be the undivided fee rule did not violate any essential right. The court held that under eminent domain theory, the government exercises the right of eminent domain against the land itself and it is valued as a whole regardless of how many interest holders there are. The court stated:

> . . . we think it clear that the rule must be precisely the same as if they were the only party interested in the damages. The statute, § 55, distinctly requires it to be so; and we do not see that any essential principal of right is violated thereby. The situation of the estate and the manner of its occupation are doubtless to be taken into consideration in estimating the injury caused by disturbing that occupation. But between the public and the landowner it is but one estate. The public right is exercised upon the land itself, without regard to subdivisions of interest by which the subject

> is affected through the various contracts of individual owners. The public cannot be expected to forego its right to take property for public uses because the exercise of that right will defeat private contracts, nor is it reasonable that losses arising from the failure of such contracts, which otherwise might furnish grounds of damage between the individual parties, should measure the compensation to be rendered for the property so taken. Such a rule would seriously impair the public right. A fair compensation for the property taken and injury done, ascertained by general rules, is a substitute to the owners for that of which they are deprived. That is the whole of the transaction with which the public is concerned. The apportionment is merely a setting out to the several owners of partial interests of their corresponding rights in the fund which has been substituted for the property taken. 108 Mass. 535, 544, 1871 W.L. 8864, P.6.

The basic undivided fee rule has not changed in this country since those early days. As stated in the quotation, the situation of the estate is to be considered when deciding what the government should pay. Therefore, the jury could consider during the valuation stage any favorable leases or income being produced on the property to determine what a buyer might pay for it. However, as between the public and property owner, the property is to be valued as if owned by one person. The Massachusetts court went on to rule that a question to one of the owners as to the amount of rent they were receiving on the property was properly allowed. 108 Mass. 535, 546, 1871 W.L. 8864, P.8. The court also ruled that the trial court rightly refused to allow the interest holders to present their claims in separate cases upon which separate judgments and verdicts could be rendered. 108 Mass. 535, 547, 1871 W.L. 8864, P.8.

There is an old saying that there is nothing new under the sun. That is apparently true with eminent domain cases. The owners in the Edmands case argued that the sum of the market value of all of the separate leases, valued separately, exceeded the value of the property as a whole. However, the court ruled that it does not follow that that is an unjust result as between the owners and the public and that as long as the court came to a fair conclusion in the apportionment stage of the proceedings that the statute could not be "impeached" on those grounds. 108 Mass. 535, 549-550, 1871 W.L. 8864, P.10.

Likewise, the undivided fee rule is not new the federal court system. In the case of Silberman v. United States, 131 F.2d 715 (1942), the First Circuit recognized in the case such as this that when there is a condemnation of property owned by one party and leased by another, the first stage of the proceedings is to determine the value of the property which is then paid by the government. The court held that the trial court has a discretion to exclude cumulative evidence on the question of value of the property as a whole which was sought to be introduced by a lessee since the question of the value of the property as a whole is the only important question for the jury to determine at the first stage of the trial. 131 F.2d 715, 717. The court also ruled that the value of the leasehold should not be introduced at the initial valuation stage as the value of the leasehold was not then an issue before the jury. On the issue of apportionment, the court cited the case of Carlock v. United States, 53 F.2d 926 (1931) for the proposition that the proper way to apportion the award between the owner and the lessee was to determine the value of the lessor's reversionary interest and subtract that from the amount awarded which would leave the amount to be distributed to the lessee. In the case of United States v. 131.68 Acres of Land, 695 F.2d 872 (1983), the Fifth Circuit

applied the undivided fee rule to a taking by the U.S. government and stated the applicable language of courts that follow the rule when it stated:

> . . . This common sense notion is expressed by the so - called "undivided fee rule," which provides that the division of a fee into separate interests cannot increase the amount of compensation that the condemnor has to pay for the taking of the fee. 695 F.2d 872, 875.

More recently, in the case of United States v. 1.377 Acres of Land in the City of San Diego, ___ F.3d ___, 2003 W.L. 22961693 (Dec. 2003), the Ninth Circuit Court of Appeals stated:

> It is well established that when the government exercises its power of eminent domain, it compensates the people who have possessory interests in the seized land under the so called "undivided fee rule". . . The "undivided fee rule" essentially operates by permitting the governmental authority to condemn property by providing just compensation, then allowing the respective interest holders to apportion the award among themselves, either by contract or judicial intervention. Burkhart v. United States, 227 F.2d 659, 662 (9th Cir. 1955). Usually, the courts treat the eminent domain proceeding for the division of proceeds as one of interpleader, where the government deposits the just compensation for the whole parcel and the landlord and tenant come in as claimants. Vivian v. Board of Trustees, 152 Colo. 556, 383 P.2d 801, 803 (Colo. 1963). Once the reasonable market value of the property subject to eminent domain proceedings has been established, the apportionment of that amount among persons claiming

> an interest therein is a matter of no concern to the condemnor. Once the government provides just compensation for the condemned property, its role is at an end, because condemnors do not, as a practice, apportion the awards among the various interests involved. Washington v. Farmers Union Grain Co., 908 P.2d 386, 389 (Was. Ct. App. 1996). Rather, the apportionment is left to either the discretion of the court or the allocation agreed upon by the parties in a contract. . . . ___ F.3d ___ 2003 W.L. 22961693, P.7.

The claim by the Petitioners that the undivided fee rule is not fair is simply a fallacy. As was noted by the Nevada Supreme Court in this case, when the trial court departed from the undivided fee rule, the County ended up paying over $2,000,000.00 for a parcel that was appraised by four different appraisers, the highest of whom came in with an opinion that the property was worth $1,148,000.00. "Thus, the district court's just compensation resulted in an award more than what Sun State and the Pyles lost." 72 P.3d 954, 960.

3. Misstatements of Fact.

Supreme Court Rule 15 provides that attorneys are to point out to the court any perceived misstatements of fact. It is presumed that the misstatements in the Petition were not intentional. In fact, the attorneys drafting the Petition were not involved in the state court proceedings and probably got the erroneous information from the trial court judge's findings which were in error.

The first misstatement of fact is at page 4 of the Petition. The Petitioners state that Clark County valued the leasee's

leasehold interest at zero. They also state that the Petitioners introduced evidence that the leasehold had a value beyond the valuation of the fee simple value which was not contradicted by any evidence produced by the County. These statements simply are not true. The County introduced two separate appraisals. One was originally hired by the County and the other was originally hired by the Petitioners. Contrary to the statement in the Petition, the appraisal of Verne Cox which was submitted by the County as an exhibit valued the entire property at a market value of $1,050,000. It also valued the leasehold value at $799,000 and valued the owner's reversionary interest at $251,000. The error by the trial court in not knowing that the County introduced such evidence was corrected by the state supreme court. The appraisal figures of Mr. Cox were set out in the state supreme court opinion at 72 P.3d 954, 956.

At page 5 of the Petition, the Petitioner states that an appraiser by the name of Mr. Rothenberg determined that the value of the leasehold interest was $1,000,000 and that the value of the fee subject to leasehold plus the value of the reversion brought back to present value was $1,030,000. However, that figure was not the value of the fee subject to the leasehold. It was the value of the fee as if not subject to the leasehold. What Mr. Rothenberg did was value the lessee's interest in the lease at a very high value because the lease rental payments were so far below market value that the tenant had a substantial bonus value. However, he then valued the owner's interest in the property as if it were not encumbered by the unfavorable lease.

At page 21 of the Petition, the Petitioner states that Mr. Rothenberg was the only expert to assess the value of the Pyles' interest. Again, this is simply not true. Appraiser Shelli Lowe, appraised the Pyles' interest. Shelli Lowe

assessed the value of the Pyles' interest at $263,000.00. As stated previously, Vern Cox also assessed the value of the Pyles' interest along with the leasehold interest. He assessed the value of the Pyles' interest at $251,000.00. Again, this error by the trial court was pointed out to the State Supreme Court and the State Supreme Court included these figures in its opinion at 72 P.3d 954, 956.

4. "Safety Valve.

The Petitioners for the first time raise the allegation that the Nevada eminent domain law does not have a "safety valve" and therefore it is unconstitutional. Had the Petitioners raised the "safety valve" issue in the Nevada Supreme Court, the court probably would have discussed this issue in its opinion. The undivided fee rule will not cause anyone to get less than they are constitutionally entitled to get and the Nevada court has set forth its valuation standards in this case and in many others.

Under the undivided fee rule, the value of the property is determined as if there were one owner in the property selling it on an open market. However, if there are any features that would increase the value of the property, those features are allowed to be introduced in the valuation stage. For instance, in the case of State v. Shaddock, 75 Nev. 392, 344 P.2d 191 (1959), the Nevada Supreme Court allowed a property owner to introduce testimony about how much you would have to spend to buy a property that would generate the same income as the subject property. The court ruled that a property owner can introduce any evidence that a prudent business person would consider in determining what price to pay for a property. A later Nevada Supreme Court opinion added some foundational restrictions before a court would allow such testimony. Eikelberger v. State, 83 Nev. 306, 429 P.2d 555

(1967). However, the State Supreme Court has continually reaffirmed its "safety valve" type of reasoning in later cases. In its opinion in this case, the Nevada Supreme Court quotes the statute which provides for the ascertainment and assessment of damages payable to condemnees, NRS 37.110. The court went on to state:

> Additionally, this court has provided, "the determination of market value includes the consideration of any elements that fairly enter into the question of value which a reasonable businessman would consider when purchasing." 72 P.3d 954, 958.

The Court cited Schwartz v. State, 111 Nev. 998, 900 P.2d 939 (1995) and State v. Linnecke, 86 Nev. 257, 468 P.2d (1970). These cases state that the parties can introduce any evidence which a prudent business person would consider in determining what price to pay for a property. As a result, if there are any factors that would increase the fair market value of the property, including a favorable lease, then that fact would be admissible at the valuation stage of the proceeding. As stated previously, that is the gist of the California Intermediate Court of Appeals opinion in the case of People v. Lynbar, 253 Cal. App. 870, 62 Cal.Rptr. 320 (1967). All the Lynbar court ruled was that since there was a very high rent being generated by the lease on the property, the owner should be allowed to introduce the evidence of that rent at the valuation stage of the proceedings. Such evidence would be admissible at the valuation stage under the Nevada Supreme Court's opinion in this case and in its previous opinions. As a result, Nevada is on the same footing as any of the federal courts and the majority of the state courts that apply the undivided fee rule. At the valuation stage, the property owners can introduce evidence of rental payments, other income on the property, the useful life of the existing

buildings, amount of foot traffic going by the property, oil and mineral reserves, etc. If the property truly is worth more, the owners can introduce evidence to prove it. However, that is not what happened in this case. The owners got the district court to engage in a fiction. When valuing the lessee's interest, the court looked at the property as it actually sat and as it was encumbered on the date of value. However, when the court was valuing the owner's reversion interest, it valued it as if it were not encumbered by an unfavorable lease. Both of the appraisers that appraised the value of the owner's reversion interest as it really existed encumbered by the lease, valued it at between $251,000.00 and $263,000.00. Valuing it as if not encumbered by the lease resulted in a payment of over $1,000,000.00 to the owners. However, since the property was encumbered by an unfavorable lease, the owner's interest in the property was not as valuable as it would have been if the property were completely unencumbered. As stated previously, whether you apply the undivided fee rule or not, courts have held that it is ridiculous to suppose that a buyer would pay as much in the open market for a property that is encumbered by a bad lease as it would for a property that was unencumbered. County of Los Angeles v. American Savings and Loan, 26 Cal. App.3d 7, 12, 102 Cal.Rptr. 439, 443 (1972).

In the end, the court should value an owner's interest in leased property the same way appraisers Shelli Lowe and Vern Cox did in our case when they valued the reversion interest of the owner. The question to be answered is what did the owners loose? In this case, the owners lost property on which they would have made only $500 per month for another 18 years and they lost the value of the return of the property 18 years in the future. Both Sheli Lowe and Vern Cox did a valuation of the income stream and brought it to net present value. They then took the value of the property and

discounted for not having possession of it for another 18 years and added that to the amount of the value of the income stream. One came up with a value of $251,000.00. The other came up with a value of $263,000.00. This is the amount that the owners could use to put away in a passive investment and draw down $6,000.00 per year as they were getting from the property and at the end of 18 years have an amount equal to the value of the property. By awarding the owners over $1,000,000.00, the court gave them an amount that they could invest and earn $50,000.00 to $100,000.00 per year and at the end of 18 years still have over $1,000,000.00. Obviously, they were paid way more than what they lost.

CONCLUSION

The State Court case does not have the finality required for the granting of a writ of certiorari. Even if the court had jurisdiction to grant the petition, it should still be denied since the undivided fee rule is not unconstitutional. The rule, as applied by the Nevada Courts, awards just compensation. Before the taking in this case, the fee holder and the long term tenant shared the ownership of a property worth about $1,000,000. By ignoring the undivided fee rule, the trial court awarded the fee owners and the tenant about $1,000,000 each. Obviously that result is wrong. Since they shared ownership of a building worth $1,000,000, they should share an award of $1,000,000. That is what the undivided fee rule provides.

Respectfully submitted:

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